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Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

YI QIANG YANG,

*Petitioner*,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1101(a)(42), provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political opinion" and is therefore eligible for asylum in the United States. The Board of Immigration Appeals has held that legally registered spouses of persons subjected to these procedures qualify for asylum under this provision. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997) (en banc). The question presented is:

Whether married individuals whose spouses suffered forced abortions or sterilizations imposed by China's coercive population control policy, and who were prevented from registering their marriages due to minimum age requirements imposed by the same policy, are "refugees" eligible for asylum.

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## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is available at 494 F.3d 1311. This opinion was issued pursuant to the court of appeals' *sua sponte* rehearing and superseded a prior court of ap peals opinion (App., *infra*, 18a-34a) that is not reported. The opinion of the Board of Immigration Appeals (*id.* at 35a-38a) and the opinion of the Immigration Judge (*id.* at 39a-58a) are not reported.

## JURISDICTION

The judgment of the court of appeals was originally entered on July 12, 2007. The court, on its own motion, granted rehearing and entered judgment on August 8, 2007. On October 30, 2007, Justice Thomas granted an extension within which to file a petition for writ of certiorari to and including December 6, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The Immigration and Nationality Act ("INA") states:

> The term "refugee" means (A) any person who is * * * unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

8 U.S.C. § 1101(a)(42)(A). Section 601 of the Illegal Immigration Reform and Immigrant Responsibility

Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 amended this provision to include:

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42)(A).

## STATEMENT

Under China's coercive population control policy, married couples are permitted to have only one child; unmarried individuals are not allowed to have children. To further ensure limited population growth, the Chinese government imposes severe age restrictions on state-recognized marriage and makes use of compelled abortion and sterilization.

Congress enacted Section 601 of IIRIRA in response to this policy. Under Section 601, victims of forced abortion and sterilization are eligible for asylum in the United States. The Board of Immigration Appeals ("BIA") has interpreted the statute to mean that when one spouse is forced to abort an unborn child or to undergo a sterilization procedure, both spouses have been persecuted within the meaning of Section 601.

The question presented in this case is whether spouses who have entered into so-called "traditional" marriages, but have been unable to formally register their marriages because of China's age restrictions on marriages, are automatically eligible for asylum under Section 601. The Seventh and the Ninth Circuits have held that traditionally married spouses should benefit from the rule of automatic eligibility. The Eleventh Circuit here found that they should not, even if legally registered spouses get the benefit of the rule. And in contrast to these two approaches, the Second Circuit would deny per se eligibility to *all* spouses. Because this is an issue of enormous practical importance – and because the decision below creates an arbitrary distinction that cannot be reconciled with the congressional intent – further review is warranted. Alternatively, because the Attorney General recently commenced a proceeding that will reconsider administrative policy in this area, the Court should hold this petition pending disposition of that proceeding.

### A. China's Population Control Policy

This case arises in the context of China's coercive population control policy. China employs this population control regime – commonly called the "one-couple, one-child" policy – to slow population growth. The policy forbids families from having multiple children and prevents couples from having children before they reach the legal age for marriage in China. U.S. Dep't of State, *Country Reports on Human Rights Practices: China 2006* § 1(f) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm [hereinafter *Country Report*]; Cong.-Exec. Comm'n on China, *2007 Annual Report* 108-11

(2007); Amnesty Int'l, *Report 2007: The State of the World's Human Rights* 85-86 (2007).

To punish violations of the population control policy, the government aborts fetuses and frequently sterilizes those who violate the policy. *Country Report*, *supra*, § 1(f). Indeed, at least seven Chinese provinces legally require "termination" of unauthorized pregnancies, and another ten provinces require unspecified "remedial measures." *Ibid.* In practice, coerced abortions and sterilizations occur in every region and province of China. Cong.-Exec. Comm'n, *supra*, at 111.

These human rights violations are common, extensive, and contemporary. For example, the 2006 State Department Country Report profiles the mass abortion and sterilization that took place in 2005 in the Linyi, Shandong Province. *Country Report*, *supra*, § 1(f); Cong.-Exec. Comm'n, *supra*, at 110. According to the State Department, reliable international sources believe that local Chinese officials detained approximately 130,000 persons and forced many of them to submit to abortion or sterilization. *Country Report*, *supra*, § 1(f). At least 7000 persons were forcibly sterilized, and late-term abortions were reported. *Ibid.* Similarly, in the spring of 2007, officials in Bobai County, Guangxi Zhuang Autonomous Region, "initiated a wide-scale campaign" to control birthrates, which included forced abortions and sterilizations. Congr.-Exec. Comm'n, *supra*, at 110.

China's population control policy also imposes severe restrictions on state-recognized marriage. To register a marriage, the national policy dictates that a man must be twenty-two years of age and a woman must be twenty, and many localities impose higher minimum marriage ages. See Marriage Law (prom-

ulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001) art. 8, translated in LawInfoChina (find at http://www.lawinfochina.com) (P.R.C.).

Because individuals often marry at an earlier age in Chinese culture, couples frequently enter marriage relationships without official state sanction. John W. Engel, *Marriage in the People's Republic of China*, 46 J. of Family & Marriage 955, 958-59 (1984). Courts in the United States generally refer to these Chinese marriages as "traditional marriages."

Traditional marriage ceremonies are an important aspect of Chinese culture and have been performed for 2500 years. *Ibid.* Indeed, in some regions of China they make up a very substantial majority of all marriages. See *infra*, 24-25. But because traditionally married spouses are unable to register their marriages with the government, the state treats such couples who have children as violators of the population control policy. Accordingly, such couples are often subjected to forced abortions or sterilizations. See, *e.g.*, *Ma* v. *Ashcroft*, 361 F.3d 553, 555-56 (9th Cir. 2004); *Zheng* v. *Ashcroft*, 397 F.3d 1139 (9th Cir. 2005); *Lin Chen* v. *U.S. Dep't of Justice*, 241 F. App'x 733 (2d Cir. 2007).

### B. Statutory and Executive Branch Responses to China's Population Control Policy

Since China implemented its population control policy, Chinese nationals affected by the policy have sought asylum in the United States. Asylum seekers have claimed that forced abortion and sterilization violate their political rights, and therefore that they are victims of political persecution within the mean-

ing of 8 U.S.C. § 1101(a)(42)(A). If deemed victims of persecution, they are refugees eligible for asylum in the United States under the INA. *Ibid.*

In 1989, the BIA rejected this argument and held that individuals subject to forced abortion and sterilization are persecuted only if "the governmental action arises for a reason other than general population control." *Matter of Chang*, 20 I. & N. Dec. 38, 44-45 (BIA 1989). The BIA found that a generally applicable policy of forced abortion and sterilization did not constitute persecution for purposes of the INA. *Ibid.*

In response to the BIA's ruling, both Congress and the executive branch took steps to extend asylum eligibility to victims of forced abortion or sterilization, including the spouses of persons directly subject to these procedures. Swiftly responding to *Chang*, Congress passed the Emergency Chinese Immigration Relief Act ("ECIR") in 1989, providing in pertinent part that:

> [T]he Attorney General shall promulgate regulations to * * * provide that an applicant * * * shall be considered to have established a well-founded fear of persecution based on political opinion if returned to China if the applicant establishes that (1) the applicant (*or applicant's spouse*) has refused to abort a pregnancy or resisted sterilization in violation of China's family planning policy directives * * *.

H.R. Res. 2712, 101st Cong. § 3(b) (1989) (emphasis added). Although President George H.W. Bush vetoed this bill, he did so because he believed that its aim could be accomplished more effectively through action by the Executive Branch. Memorandum of

Disapproval of H.R. 2712, H.R. Doc. No. 101-132, at 2 (1990).

Attorney General Thornburgh then issued an interim regulation to implement the President's directive. Like H.R. 2712, the regulation provided that forced abortion and sterilization could be grounds for asylum as persecution on account of political opinion, and protected "[a]n applicant who establishes that the applicant (*or applicant's spouse*) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy." Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2805 (proposed Jan. 29, 1990) (emphasis added). See also Policy Implementation with Respect to Nationals of the People's Republic of China, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990); Memorandum from the Office of General Counsel of INS 1 (Nov. 7, 1991), reprinted in 69 Interpreter Releases app. I 311, 311 (1991). Subsequently, Attorney General Barr signed a rule that provided asylum eligibility to an applicant "and the applicant's spouse, if also an applicant." *Zhang* v. *Slattery*, 55 F.3d 732, 740 (2d Cir. 1995) (citing Att'y Gen. Order No. 1659-93).

After this executive policy ended during the Clinton Administration, Congress passed Section 601 of IIRIRA in 1996. The legislation amended the INA's definition of refugee to expressly address victims of forced abortion and sterilization. Section 601 provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opin-

ion," and accordingly is a "refugee" eligible for asylum under the INA. 8 U.S.C. § 1101(a)(42)(A).

Following the enactment of the statute, the BIA concluded that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse," so that spouses are deemed eligible for asylum. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997) (en banc). In that case, INS (now the Department of Homeland Security, "DHS") stated its position "that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him." *Id.* at 918 (citing Memorandum from INS, at 4 (Oct. 21, 1996)).

In 2006, the BIA again considered this statutory provision in a case presenting the question whether unmarried partners – like boyfriends or fiancées – of women forced to undergo abortions may also qualify for asylum under Section 601. See *Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006). In *S-L-L-*, DHS changed its position and requested that the BIA revisit the rule issued in *C-Y-Z-*. *Id.* at 3-4. The BIA declined to do so, reaffirming *C-Y-Z-* and stating that spouses are eligible for asylum based on their partner's forced abortion or sterilization. *Id.* at 7. The BIA limited this holding to spouses, however, and stated that unmarried partners were not eligible for relief.

### C. Proceedings Below

1. Petitioner Yi Quang Yang, a native and citizen of China, entered into a traditional marriage with Jian Hui Ling on July 15, 2000. App., *infra*, 2a. They conducted a marriage ceremony that was at-

tended by friends and family. *Ibid.* The couple exchanged rings to symbolize their marriage. *Ibid.* The couple did not register their marriage because, under Chinese law, they were below the legal age (Yang was twenty and Ling was seventeen). *Ibid.* Ling became pregnant soon after the couple married. When the couple discovered that Ling was pregnant, they hid at a relative's house to avoid detection by state officials. *Ibid.*

When Ling was eight months pregnant, government officers learned of the pregnancy and took Ling to a hospital. There, population control officials forcibly aborted Ling's pregnancy; the fetus was placed in a bag and disposed of in front of Ling. *Id.* at 4a.

When Yang discovered that his wife had been taken into custody by the family planning officials, he went to the hospital in an effort to free her. *Id.* at 2a-3a. After a vocal confrontation with the officials, they began to beat him. *Id.* at 3a. Though Yang managed to escape, the following day he was subpoenaed by the local security office. *Ibid.* Rather than surrender, he fled to the United States and applied for asylum. *Ibid.*

2. At the asylum hearing, Yang provided evidence of his marriage to Jian Hui Ling in a traditional ceremony, and of the forced abortion. The immigration judge nevertheless denied Yang's petition because he "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." App., *infra*, 5a, 53a. The BIA dismissed Yang's appeal in an unpublished opinion, agreeing that "an applicant must have entered into a legally recognizable marriage" and "[u]nderage couples living in de

facto unregistered relationships are not recognized as married by the Chinese government." *Id.* at 36a.

3. Yang appealed the BIA's ruling to the Eleventh Circuit. App., *infra*, 1a-17a. The court noted that "two circuits [the Seventh and the Ninth] have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the population control laws, then the couple should be considered as married for the purposes of claiming asylum under the *C-Y-Z-* decision." *Id.* at 13a. But the Eleventh Circuit rejected the holdings of those courts, concluding that it was reasonable for the BIA to deny protection to traditionally married fathers because of the "sanctity and long-term commitment" that legal marriage entails. *Id.* at 12a.[1]

D. **Attorney General Proceeding.**

In an immigration proceeding commenced after the Eleventh Circuit's decision in this case, the Attorney General currently is considering a matter involving issues related to those presented in this petition. Jianhua Shi sought asylum under Section 601

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[1] The Eleventh Circuit issued its opinion on July 12, 2007. App., *infra*, 18a-34a. On its own motion, the court granted rehearing and substituted a new opinion on August 8, 2007. *Id.* at 1a-17a. The amended opinion includes a brief discussion of the Second Circuit's opinion in *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), which was decided on July 16, 2007. The Eleventh Circuit eliminated from its original opinion dicta stating that legally recognized spouses are per se eligible for asylum under Section 601. Compare App., *infra*, 11a-12a with *id.*, at 28a-29a. As discussed, *infra* at 15-16, the Second Circuit's opinion deepens the division among the circuits.

on the grounds that his spouse was subject to a forced sterilization. After the BIA denied his petition (*Matter of Jianzhong Shi*, A95 476 611 (BIA 2006)), Shi appealed to the Third Circuit.

On July 27, 2007, the Third Circuit issued a sua sponte order scheduling an en banc hearing to address the question of "whether spouses of those victimized by China's coerceive [sic] population control policy are entitled to automatic eligibility for asylum under the Immigration and Nationality Act." *Jianzhong Shi* v. *U.S. Att'y Gen.*, No. 06-1952 (3d Cir. July 27, 2007) (order directing parties to brief issue before en banc court). Following entry of this order, the Attorney General withdrew the BIA decision in *Shi* pursuant to 8 C.F.R. § 1003.1(h) and directed DHS and Shi to brief the question posed by the Third Circuit in the Office of Legal Counsel. *Jianzhong Shi* v. *U.S. Att'y Gen.*, No. 06-1952 (3d Cir. Oct. 24, 2007) (order remanding case). On October 24, 2007, the Third Circuit remanded the matter to allow the Attorney General to review the BIA opinion. *Ibid.*

## REASONS FOR GRANTING THE PETITION

In the instant case, the Eleventh Circuit held that spouses who are married in traditional ceremonies, but are unable to register their marriages, do not qualify for asylum in the United States. App., *infra*, at 12a. This holding is in direct conflict with decisions of the Seventh and the Ninth Circuits, which have held that asylum extends to the traditionally married spouses of persons subjected to forced abortion and sterilization. The Second Circuit has taken yet another approach, holding that *no* spouses – whether registered or not – benefit from Section 601's rule of automatic asylum eligibility. *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 305 (2d

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Cir. 2007) (en banc). This issue plainly is a recurring one of great practical importance as to which uniform treatment across the circuits is essential.

As we have noted, following the decision in *Lin*, the Attorney General chose to initiate a review and directed the BIA to refer its decision in *Matter of Jianzhong Shi*, A95 476 611 (BIA 2006), which was before the Third Circuit at the time. The question in that proceeding is whether any spouses – registered or traditional – are entitled to asylum under U.S. immigration law. Notwithstanding the pendency of that proceeding, however, this Court should grant review in this case to restore uniformity in the application of the law on the question presented. A conflict almost certainly will persist among the circuits regardless of the Attorney General's decision because courts of appeals on both sides of the debate, relying on the plain language of the statute and what they regard as the manifest congressional policy, already have rejected an agency interpretation of Section 601. Alternatively, if it does not grant review, the Court should hold the petition in this case pending a decision by the Attorney General; to do otherwise would result in a manifestly inequitable result, as it would mean that an accident of timing would deny petitioner either the possibility of review in this Court or the opportunity to benefit from a favorable ruling by the Attorney General.

### A. The Courts Of Appeals Are Divided Over Whether Traditionally Married Spouses Of Persons Subjected To Forced Abortion Or Sterilization Are Eligible For Asylum.

In applying Section 601 of IIRIRA, the courts of appeals have disagreed as to whether a traditionally

married spouse is deemed eligible for asylum relief. Traditionally married spouses *are* eligible for asylum in two courts of appeals. But they are *not* eligible for asylum in two other circuits. One additional circuit also suggested approval for the rule denying asylum to claimants like the petitioner.

1. The Seventh and Ninth Circuits have held that traditionally married spouses are eligible for asylum under Section 601. The Seventh Circuit has held that "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum" when his wife suffers a forced abortion or sterilization. *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). See also *Zhu* v. *Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006) (same); *Chang Sheng Lu* v. *Gonzales*, 199 F. App'x 552, 554 (7th 2006) (same).

Likewise, the Ninth Circuit has interpreted Section 601 as applying to traditionally married spouses. *Ma* v. *Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004). The court held "that the protections of [Section 601] apply to husbands whose marriages would be legally recognized, but for China's coercive population control policies, and not only to husbands whose marriages are recognized by Chinese authorities." *Id.* at 561. See also *Zheng* v. *Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005) (same); *Zi Zhi Tang* v. *Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007) (same).[2]

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[2] The Third, Fourth, Fifth, Sixth, and Eighth Circuits have accepted the BIA's determination that spouses of persons subjected to forced abortion and sterilization qualify for asylum,

2. The Second and Eleventh Circuits disagree. The Eleventh Circuit below "recognize[d] that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the population control laws, then the couple should be considered married for the purposes of claiming asylum under the *C-Y-Z* decision." App., *infra*, 13a. Nonetheless, the court held that "[b]ecause Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under [Section 601]." *Ibid.*[3]

The Eleventh Circuit sought to avoid the contrary holdings of *Ma* and *Zhang* on the theory that those decisions "were rendered before the BIA's

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but have not ruled on the extension of per se asylum to traditionally married spouses. *Sun Wen Chen* v. *U.S. Att'y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007); *Lin-Jian* v. *Gonzales*, 489 F.3d 182 (4th Cir. 2007); *Li* v. *Ashcroft*, 82 F. App'x. 357, 358 (5th Cir. 2003) (per curiam); *Huang* v. *Ashcroft*, 113 F. App'x. 695, 698-99 (6th Cir. 2004); *Hong Zhang Cao* v. *Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006). But see *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 228-31 (3d Cir. 2004) (Alito, J.) (suggesting that Section 601 asylum eligibility is limited to spouses whose marriages are legally recognized).

[3] The Third Circuit also has expressed approval of the denial of asylum to claimants like the petitioner. *Cai Luan Chen*, 381 F.3d at 228-31 (Alito, J.). Although the case did not involve a traditional marriage, the court denied asylum for the "[petitioner] and other unmarried persons who *wanted* and indeed *tried* to get married but were prevented from doing so by a law that is an integral part of a program of persecution." *Id.* at 230-31 (emphasis in original). The Third Circuit acknowledged that its "reasoning may appear to be in tension with that of *Ma* v. *Ashcroft*." *Id.* at 231.

*S-L-L-* decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little persuasive value now." App, *infra*., 13a. But this argument is wrong. *S-L-L-* addressed only the distinction between legally recognized husbands and fathers who are not married, like boyfriends and fiancées. *Matter of S-L-L-*, 24 I. & N. Dec. 1, 8 (BIA 2006) (holding that marriage is the "linchpin" to the *C-Y-Z-* grant of asylum to spouses). The BIA stated that the "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *Id*. at 9. Under this rationale, as described, *infra* at 23-25, traditionally married spouses are indistinguishable from couples whose marriages are legally recognized. The BIA was not presented with, and consequently did not consider, a case involving traditional marriage.

In any event, and regardless of the BIA's analysis, both the Seventh and Ninth Circuits have held that traditionally married spouses are eligible for asylum under Section 601 in cases decided *after S-L-L-*. See, *e.g.*, *Zi Zhi Tang* v. *Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007); *Chang Sheng Lu* v. *Gonzales*, 199 F. App'x 552, 554 (7th Cir. 2006). The circuits remain divided following *S-L-L-*.

The Second Circuit also disagrees with the Seventh and Ninth Circuits, but on different grounds: it withholds the rule of automatic asylum eligibility for *all* spouses – registered and traditionally married. In *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007), cert filed *sub. nom Zen Hua Dong* v. *Mukasey*, No. 07-639 (Nov. 13, 2007), the court concluded that "the BIA erred in its interpretation of 8 U.S.C. § 1101(a)(42) [in *C-Y-Z-*] by failing to

acknowledge language in [Section] 601(a), viewed in the context of the statutory scheme governing entitlement to asylum, that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners of individuals expressly [Section] 601(a) protects." Consequently, the court denied asylum to the petitioners before them, who were all boyfriends or fiancées. *Id.* at 314.

Although the petitioners in *Shi Liang Lin* were unmarried partners, the Second Circuit has since applied its rule to deny asylum to traditionally married spouses. See, *e.g.*, *Cheng Yang Lin* v. *Board of Immigration Appeals*, 231 Fed. Appx. 74 (2d Cir. Jul 19, 2007); *Lin Chen* v. *U.S. Dep't of Justice*, 241 F. App'x 733, 733 (2nd Cir. 2007).

3. The conflict and confusion on this issue are persistent and ripe for this Court's review. In addition to the court below, several circuits have recognized the disagreements among the courts of appeals. See, *e.g.*, *Shi Liang Lin*, 494 F.3d at 300 n.4 ("The circuits are already split over whether [Section] 601(a) provides protection for individuals who marry in traditional ceremonies not recognized by their government and later seek asylum based on the forced abortion or sterilization of their 'common law spouse.'"); *id.* at 334 (Calabresi, J., concurring and dissenting) (arguing the Second Circuit "is in direct conflict with every other circuit, the BIA, and ten years of rulings"); *Chen* v. *Gonzales*, 418 F.3d 110, 111 & n.2 (1st Cir. 2005) (recognizing the "active circuit split on this question of law").

4. The confusion about the governing rule, and the meaning of the statutory language, is highlighted by the differing positions taken by the government itself. On some occasions, the government has ar-

gued that traditionally married spouses are eligible for asylum. See, *e.g.*, U.S. Br. 17, *Zhang* v. *Gonzales*, 434 F.3d 993 (7th Cir. 2006) (containing argument heading "Zhang Would Establish Past Persecution If He Established That He Was Married in a Traditional Chinese Ceremony and Chinese Authorities Forced His Wife To Have an Abortion"). In other cases, the Department of Justice has argued against according such applicants asylum. See, *e.g.*, U.S. Br. 21, *Ma* v. *Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (arguing that "the Board's conclusion that *C-Y-Z-* should not be extended to cover legally unmarried partners, must be affirmed" and thus Ma's traditional marriage should not fall under per se asylum eligibility); *Shi Liang Lin*, 494 F.3d at 300 (describing government's position as same). In contrast to the DOJ position, the Department of Homeland Security has argued in favor of the Second Circuit approach that *no* spouses are eligible for asylum. *Id.* at 310 n.11 (describing DHS brief). An issue that has spawned such confusion and uncertainty warrants this Court's attention.

### B. This Case Presents An Issue Of Profound National Importance.

This case raises a significant question of national importance that warrants review by this Court. The circuit split at issue in this case creates intolerable inconsistency in the application of national immigration law, with significant consequences. If Yang's case had been decided in the Seventh or Ninth Circuits, he would have been deemed eligible for asylum under Section 601. The fate of traditionally married spouses thus turns on nothing more where their case is heard.

This inconsistency both causes substantial injustice for asylum applicants like Yang and creates perverse incentives for future asylum applicants. If the courts remain divided, an asylum applicant will have an incentive to strategically choose a point of entry to ensure that his or her case is heard in a circuit where he or she may be eligible for asylum. Moreover, the widespread confusion over the application of immigration law in this context will likely burden the courts with further appeals of this type. The Court should resolve this conflict now.

The circumstances at issue in this case arise frequently. As originally enacted, IIRIRA limited the annual number of visas that were available for applicants under Section 601 to 1000. Pub. L. No. 104-208, § 601(b), 110 Stat. 3009-689. Between 1998 and 2003, the annual number of applicants who were granted relief under this provision vastly exceeded 1000; by 2004 – within eight years of the passage of IIRIRA – more than 9000 applicants were on the waiting list. Cong. Research Serv., *U.S. Immigration Policy on Asylum Seekers* 16-17 (2006). See also News Release, Executive Office for Immigration Review, *EOIR Notifies Persons Eligible for Full Asylum Benefits for Fiscal Year 2004 Based on Coercive Population Control Policies* (Dec. 16, 2004), *available at* http://www.usdoj.gov/eoir/press/04/CPCAsylumReleaseDec04.htm.

The Real ID Act of 2005 eliminated the annual cap on the number of annual visas available under Section 601. Pub. L. No. 109-13, Div. B, tit. I, § 101(g)(2), 119 Stat. 231, 305-06 (2005). In 2006, U.S. immigration courts received nearly 9000 claims from Chinese asylum seekers, and more than 4000 Chinese applicants appealed IJ decisions. U.S. Dep't of

Justice Executive Office for Immigration Review, *FY 2006 Statistical Year Book* (February 2007). A substantial number of these claims relate to China's coercive population control policies. And as discussed, *infra* at 24-25, a significant portion of couples in China are traditionally married. The lower courts would greatly benefit from guidance from this Court regarding application of Section 601.

### C. The Eleventh Circuit Erred By Holding That Traditionally Married Spouses Are Not Eligible For Asylum Under Section 601.

The need for review is especially acute because the Eleventh Circuit erred in holding that traditionally married spouses are not automatically eligible for asylum. *Spouses* plainly are eligible for asylum under the immigration laws. And *traditionally married spouses* are victimized by coercive population control policies in precisely the same way as registered spouses.

#### *1. The spouses of persons subjected to a forced abortion or sterilization are eligible for asylum under immigration law.*

To begin with, Congress plainly intended to provide per se protection to spouses when it enacted Section 601, which provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42). Significantly, the provision utilizes the gender-neutral word "person," indicating that the provision could apply to either member of a couple. This would have been a very odd formulation had Congress intended to provide asylum protection

only to women who have suffered forced abortions.[4] In fact, the sponsors of Section 601, Congressman Chris Smith and former Congressman Henry Hyde, submitted a brief to the Attorney General in the *Shi* proceeding making this very point, stating that "Section 601 of IIRIRA was intended to provide asylum to all victims – including spouses – of forced abortion and sterilization." Amicus Br. of Rep. Chris Smith and Former Rep. Henry Hyde, at 12, *Matter of Jianzhong Shi*, A 95 476 611 (filed Nov. 2, 2007) (pending before the Attorney General).

Congress confirmed that interpretation of the statute in the debate surrounding its enactment, which is replete with references to "couples" and "men and women" affected by China's coercive population control policies. H.R. Rep. No. 104-469(I), at 174 (1996) (stating that Section 601 was intended to provide relief for "[c]ouples" who were persecuted because of "'unauthorized' * * * pregnancies."). For instance, Representative Smith criticized the lack of asylum eligibility for couples and proposed a "safe haven" for "women and men who were fleeing from forced abortion," because spouses are affected by coerced abortion or sterilization. *Hearing on Coercive*

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[4] The omission of the word "spouse" from Section 601 has no significance. Section 601's legislative predecessor, the ECIR, used a somewhat different formulation, referring to circumstances where "the applicant (or applicant's spouse) has refused to abort a pregnancy." H.R. Res. 2712, 101st Cong. § 3(b) (1989). Section 601 broadened this language, dropping the reference to "the applicant" and instead referring to "a person who has been forced to abort a pregnancy." Use of the more general term "a person" made reference to spouses unnecessary; indeed, language identifying "a person or a person's spouse forced to abort a pregnancy" would have been nonsensical.

*Population Control in China Before the Subcomm. On Int'l Operations & Human Rights of the H. Comm. On Int'l Relations*, at 28, 104th Cong. 40 (1995) (statement of Rep. Christopher Smith). Representative Goodling protested the plight of "a group of Chinese men" held in a local jail for over 1000 days after fleeing China's coercive population control policies. 142 Cong. Rec. H2084-03, H2087 (1996) (statement of Rep. Goodling). It would be an odd result indeed if Section 601 did not provide relief to the very victims whose circumstances motivated enactment of the legislation.

Furthermore, it is absolutely clear that Congress meant to endorse the policy of the George H.W. Bush administration on this point, which explicitly granted such protection to both spouses victimized by coercive population control policies. For example, Representative Smith explained that the IIRIRA "reinstates the Reagan-Bush policy" of providing asylum to all victims of forced abortion. 142 Cong. Rec. H4151-04, H4153 (1996) (statement of Rep. Smith). See also *Hearing on Coercive Population Control*, *supra*, at 28; 142 Cong. Rec. H2084-03, H2087 (1996) (statement of Rep. Goodling); 142 Cong. Rec. H2589, H2633-34 (1996) (statement of Rep. Smith). And as explained above (*supra*, at 6-8), it is clear that the Bush administration provided asylum relief to spouses.

That Congress took this approach is hardly surprising: in reality, there can be no doubt that *both* spouses are victimized when a pregnancy is forcibly aborted or a spouse is sterilized. Affirming *C-Y-Z-*, the BIA explained why that is so:

> A forced abortion imposed on a married couple naturally and predictably has a profound im-

> pact on both parties to the marriage. Although a forced abortion does not entirely end a couple's procreative potential, the forced abortion, like sterilization, deprives a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them. A husband also suffers emotional and sympathetic harm arising from his spouse's mistreatment and the infringement on their shared reproductive rights. Local [Chinese] Government officials understand this when they force a married couple to abort their prospective child. We find that such Government action is explicitly directed against both husband and wife for violation of the Government-imposed family planning law and amounts to persecution of both parties to the marriage.

*In re S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006) (citations omitted).

It is telling that all the courts of appeal – except the Second Circuit – to have considered the question agree that spouses are victimized by China's coercive family planning policy and therefore are eligible for asylum under Section 601. See, *e.g.*, *Sun Wen Chen*, 491 F.3d at 108 (3d Cir. 2007) ("[F]orced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse. * * * And persecution of one spouse can be one of the most potent and cruel ways of hurting the other spouse * * *." ); *Zhang*, 434 F.3d at 1001 (7th Cir. 2006) ("Although his wife was certainly a very direct victim of China's population control measures, Zhang was a victim as well. The forcible abortion has deprived him of his unborn child, of the ability to

realize the family that his wife and he had desired, and forever deprived him of the ability to become a parent to that unborn son or daughter with his wife."). See also *Shi Liang Lin*, 494 F.3d at 330 (Sotomayor, J., concurring) ("[A] desired pregnancy in a country with a coercive population control program necessarily requires both spouses to occur * * *. The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child."). Because spouses similarly suffer the profound effects of forced abortion and sterilization, they should be eligible for per se asylum.

Congress, furthermore, has done nothing to overturn the decade-old view that IIRIRA covers spouses. In this context, where the high-profile issues of abortion, immigration, and Chinese family-planning policy intersect, and congressional oversight is ever-present, it is appropriate to "ascribe meaning to the absence of congressional response to administrative and judicial interpretations of a statute." *Shi Liang Lin*, 494 F.3d at 323 (Katzmann, J., concurring). In fact, as we note above (*supra*, at 18), Congress implicitly affirmed the protection for spouses recognized by courts when it removed the 1000-person annual cap that had limited the number of individuals annually admitted pursuant to Section 601. Thus, it is clear that asylum protection should extend to spouses of victims of forced abortion or sterilization.

*2. In extending asylum to victims of coercive population control policies, courts should not distinguish between couples who have traditional marriages and those who have formally registered their marriages.*

a. Once it is recognized that spouses generally are protected by Section 601, it is plain that the Eleventh Circuit erred in holding that traditionally married spouses who have not formally registered their marriages are ineligible for asylum. Culturally, socially, and functionally, "traditional marriage" and "legally sanctioned marriage" are indistinguishable. In rural areas, *all* married couples perform traditional marriage ceremonies where a wife is symbolically transferred into the family of the husband. Engel, *supra*, at 959. These marriages entail an emotional bond and commitment fully equivalent to that of marriages registered with civil authorities. Indeed, registration with civil authorities is the *sole* difference between what the courts have termed "traditional marriage" and what is considered "legally recognized marriage."

Traditional marriage is common throughout China. The Chinese government itself acknowledges the prevalence of traditional, unregistered marriages, particularly in rural areas where the government estimates that such marriages make up approximately sixty to seventy percent of *all* marriages. Cent. People's Gov. of the People's Republic of China, What Are De Facto Marriages? (June 13, 2005), http://www.gov.cn/banshi/2005-06/13/content_6147.htm (citing Hu Kangsheng & Wang Shengming, *Interpretation of the Marriage Laws of the People's Republic of China* 27-29 (2001)) [hereinafter "De Facto Marriages"]. Private studies suggest that un-

registered, traditional marriages actually account for an even greater percentage of marriages. See Weiguo Zhang, *Dynamics of Marriage Change in Chinese Rural Society in Transition: A Study of a Northern Chinese Village*, 54 Population Studies 57, 66 (2000) (traditional marriages account for as high as ninety percent of rural marriages); Michael Palmer, *The Reemergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction*, 141 The China Quarterly 110, 118-19 (1995) (documenting that traditional marriages account for eighty percent of all marriages in some rural areas).

Traditionally married spouses are often unable to register their marriages because of the stringent marriage age requirements imposed by China's coercive population control laws. Here, petitioner was precluded from registering his marriage because he was twenty and his wife was seventeen. App., *infra*, at 2a. Such stringent age restrictions account for most unregistered traditional marriages within China. Weiguo Zhang, *supra*, at 66.

The Chinese government, furthermore, acknowledges that traditional marriage is widely treated as a husband-and-wife relationship in Chinese society. De Facto Marriages, *supra*. Traditionally married spouses cohabitate, hold themselves out to family and friends as a married couple, often have or attempt to have children, and frequently attempt to register their marriages, only to be turned aside by Chinese authorities.

Insofar as forced abortion and sterilization amount to persecution of male spouses who suffer the resulting emotional pain and loss, these considerations are fully applicable to traditional spouses. Given this reality, as well as the practical equiva-

lence of the two forms of marriage in virtually every other respect, it is arbitrary to distinguish between traditionally married spouses and registered spouses in determining the level of harm caused by forced abortion or sterilization.

b. In addition to being arbitrary, the Eleventh Circuit's decision – which denies protection to traditionally married spouses precluded from registering their marriages due to age restrictions – contravenes the congressional purpose underlying Section 601. Because Section 601 was specifically intended to guard *against* coercive population control policies, it would defeat the purpose of the statute to deny asylum to spouses who are unable to register their marriages simply because they do not meet stringent age requirements established as part of those policies.

Indeed, the Seventh and Ninth Circuits have highlighted the perversity of denying asylum protection to traditionally-married spouses who were unable to register their marriages. In *Zhang*, the Seventh Circuit determined that denying asylum to spouses who were prevented from marrying under Chinese law presented "a Catch-22." The Court explained:

> Zhang's asylum claim is based on China's enforcement of its population control policy, part of which includes a minimum age requirement for marriages, and a minimum age for having children. The forcible abortion in this case occurred precisely because Zhang and his wife married and became pregnant prior to those minimum ages. The marriage is not legal in China because of the population control policy.

*Zhang*, 434 F.3d at 999. The Seventh Circuit reasoned that to accept the IJ's holding in that case, which had "denied the claim precisely because that population control policy rendered the marriage illegal," would "entirely subvert [Section 601]." *Ibid.*

Similarly, in *Ma* v. *Ashcroft*, the Ninth Circuit held:

> The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and persecutory, contravenes the statute and leads to absurd and wholly unacceptable results.

361 F.3d at 559. These conclusions, premised on the plain language and clear purpose of the statute, were correct.[5]

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[5] Although the BIA rejected Yang's claim below, the decision was unpublished and is not entitled to deference. See *Perez-Enriquez* v. *Gonzales*, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944)). And the BIA previously, and properly, has held that a traditionally married spouse is persecuted when his wife is subjected to a forced abortion or sterilization. Indeed, *C-Y-Z-* itself involved a traditional marriage: the petitioner was traditionally married in 1986, but he and his wife did not register their marriage until 1991. *Matter of C-Y-Z-*, 21 I. & N. Dec. at 915-916 & n.1. Nonetheless, the BIA found that the petitioner was persecuted between 1986 and 1991 due to the forced sterilization of his wife; the fact that petitioner was a traditionally married spouse did not lessen the persecution. *Ibid.* See also *Ma*, 361 F.3d at 559 n.8 ("[T]he male petitioner [in *C-Y-Z-*] entered into a marriage deemed illegal by the Chinese government because one or both of the spouses were underage.").

### D. The Attorney General's Proceeding In *Shi* Should Not Prompt This Court To Deny Review To Petitioner.

The Attorney General is currently reviewing *Shi*, which raises the issue whether spouses should be eligible for asylum under Section 601. Nevertheless, the Court should grant certiorari to resolve the question at issue in petitioner's case. In the alternative, the Court should hold this case pending the Attorney General's decision in *Shi*.

If the Attorney General affirms the BIA's recognition that asylum should be extended to spouses, a circuit split on the issue will persist given the position of the en banc Second Circuit, which has held that "the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief, only based on persecution that they themselves suffer." *Shi Liang Lin*, 494 F.3d at 308. There accordingly is no prospect that the Second Circuit will defer to a contrary administrative conclusion.

On the other hand, if the Attorney General decides that spouses should not be deemed entitled to asylum, a circuit split will persist given the positions taken by the Seventh and Ninth Circuits. These courts conducted their own statutory analysis – interpreting the language and reviewing the purpose of Section 601 – when extending per se asylum eligibility to spouses and rejecting contrary administrative determinations by granting asylum to traditionally married spouses. See, *e.g.*, *Ma*, 361 F.3d at 559 ("The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and persecu-

tory, contravenes the statute and leads to absurd and wholly unacceptable results. Accordingly, we need not defer to the BIA's decision."). This independence and pattern of rejection of administrative determinations indicates that these circuits will not reconsider their views based on the Attorney General's decision.

If the Court determines not to grant the petition, however, it should defer disposition of the petition until the Attorney General renders his decision. To do otherwise would create a grave inequity for the petitioner based solely on the timing of his case. If the Attorney General had commenced his proceeding a year from now, petitioner's current request for review would be considered by this Court unencumbered by the pendency of the administrative review; had the proceeding started during petitioner's appeal in the Eleventh Circuit, he could have sought appropriate relief in that court; and had the Attorney General's proceeding concluded within the period in which the petitioner could seek relief from this Court, petitioner could have asked the Court to vacate the Eleventh Circuit's decision and remand the case for reconsideration in light of a favorable ruling by the Attorney General.

As it happened, however, the Attorney General did not begin the *Shi* proceeding until after the disposition of petitioner's case in the Eleventh Circuit, and that proceeding will not end until petitioner's time for petitioning this Court has expired. This accident of timing should not result in the denial of relief to petitioner and his return to the country where he suffered persecution. As a consequence, if the Court does not grant review, it should defer disposition of the petition pending resolution of *Shi*. In the alternative, the Court should remand to the court be-

low with instructions to stay the case pending the Attorney General's resolution of *Shi*.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold the case pending the outcome of the Attorney General's proceeding in *Matter of Jianzhong Shi*.

Respectfully submitted.

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DECEMBER 2007

# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 06-15742

Non-Argument Calendar

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Agency No. A77-977-849

YI QIANG YANG,

Petitioner

versus

U.S. ATTORNEY GENERAL,

Respondent

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Petition for Review of a Decision of the Board of Immigration Appeals

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**(Aug. 8, 2007)**

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Court, on its own motion, grants rehearing and substitutes this opinion for the one we issued earlier this month. See *Yang v. United States Attor-*

*ney General*, 2007 WL 2000044 (11th Cir. July 12, 2007).

Yi Qiang Yang, a native and citizen of China, entered the United States illegally on September 28, 2001. While he was detained at the airport, immigration officials conducted an entrance interview. They asked Yang why he came to the United States. He said that he came because America was "better [than] China" and "the greatest country in the world," and he wanted "to earn a living." Yang was then asked whether he had any reason to fear returning to China. He said that he might be put in jail for not having a passport, but that he would not be harmed. However, Yang continued, he "really [did not] want to go back to China." When asked for his marital status, Yang said he was "single."

Yang was charged with removal for, among other things, failing to possess a valid entry document at the time he sought admission into the country, in violation of 8 U.S.C. § 1182(a)(7)(A)(i)(I). Yang conceded that he was removable based on this charge. He also applied for asylum, withholding of removal, and relief under the Convention Against Torture.

At his asylum hearing, Yang testified that he and Jiang Hui Ling had a "traditional marriage ceremony" with friends and family on July 15, 2000. They could not be formally married, according to Yang, because under Chinese law they were under the legal age-Yang was 20 and Ling was 17.

The couple discovered that Ling was pregnant in February 2001. Because they were not legally married, Yang said, the Chinese government would force Ling to have an abortion if it discovered that she was

pregnant. To avoid detection, Yang and Ling hid at Yang's grandmother's house.

The government found out anyway. On July 3, 2001, family planning officials took Ling to the hospital to have an abortion. When Yang discovered that Ling was missing, he went to the hospital to free her. Once there, five government officials began to beat Yang, but, according to him, he grabbed a broom, beat the officials off of him, and escaped.

Yang did not return to his home because the family planning officials were waiting for him there; the next day they sent a subpoena ordering that Yang come to the local security office. Yang later heard that Ling had been forced to abort the baby. He left China on September 25, 2001.

In addition to his testimony, Yang submitted corroborating evidence in support of his asylum petition. Among the exhibits introduced at the asylum hearing, Yang offered: (1) the State Department's country report on China; (2) a note from Lianjiang hospital, dated July 3, 2001, stating that Ling had an induced abortion; (3) a subpoena from the local security office, dated July 4, 2001, summoning Yang to its office the next day; (4) a receipt, dated July 2, 2000, for two wedding rings paid for by Yang; and (5) a letter from Yang's uncle stating that he attended Yang's "traditional wedding" on July 15, 2000, Yang and Ling were married by traditional means because "early marriage is forbidden," and when Ling was forcibly taken by family planning officials to have an abortion, Yang "tried to save his wife and fought with the officials."

Yang's exhibits also included an affidavit and a letter from Ling. The affidavit, dated March 10,

2005, stated that she and Yang "held a wedding according to the old traditional custom on July 15, 2000 . . . and started to live together without going through the marriage registration formalities." The letter, dated January 7, 2003, gave the following account of her marriage, pregnancy and abortion:

> Dear Husband, do you still remember our wedding on July 15, 2000? Sometime after our marriage, in around February 2001, I did not feel good and went to see a doctor. It was then we found out I would give birth to our child . . . . But since China has a very strict checking system on Family Planning, we women have to have physical check up every three-month. On July 3rd, Mom called us and said she was very sick. We were very worry and afraid something might happen, so we rushed back to visit her. After you found out she was really sick, you sent her to the hospital immediately and left me home alone. At around 2 p.m. in the afternoon there came seven people. They claimed they were from the Family Planning Office and tried to take me away forcefully. Even though I tried to struggle and begged for their mercy, they would not bother to care. They took me to Lianjiang County Hospital and locked me up in a room. A moment later two nurses came inside. One of the nurses who had a syringe in her hand gave me a shot in my abdomen. After a few minutes, I had a very sharp pain in that area. And after my baby came out of my body, I saw the nurses put the poor baby in a plastic bag. I was so shock that I passed out. After I regain my consciousness, my mother told me that you tried to save me and

> fought with the officials of the Family Planning Office. The Cadres of the Family Planning Unit were looking for you and tried to arrest you.

The immigration judge found that Yang was not entitled to asylum because he had not established that he was subject to past persecution or that he had a well-founded fear of future persecution. The IJ acknowledged that in *Matter of C-Y-Z-* the Board of Immigration Appeals held "that an alien who's [sic] spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act." But the IJ found that Yang had "failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in [his] country of China."

The IJ also found that Yang had "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." And, the IJ found that in Yang's "own mind he is single. That's why he answered the question regarding his marital status as being single."

The IJ concluded that Yang had "failed to establish . . . a spousal relationship between him and the person he described or referred to as his wife throughout his application." Therefore,

> even if the Court were to conclude that [Yang] was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he failed to show that they

> were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals['] [decision] in the *Matter of C-Y-Z-*, does not apply in [Yang]'s case.

The IJ also concluded as an alternative ground for denying Yang's petition that the encounter with family planning officials he described was not sufficiently serious to constitute persecution. As to any well-founded fear of future persecution, the IJ found Yang's testimony to be not credible, and therefore, according to the IJ, Yang had not presented sufficient evidence that "anyone in China is looking for him on account of a protected ground."

Because Yang had not met his burden as to asylum, the IJ concluded that he could not meet the higher burden for establishing entitlement to withholding of removal. And as to Yang's CAT claim, the IJ concluded that Yang had "failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country."

The BIA dismissed Yang's appeal of the IJ's decision. The BIA agreed with the IJ that "an applicant must have entered into a legally recognizable marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*.," and "[u]nderage couples living in de facto unregistered relationships are not recognized as married by the Chinese government."

The BIA also concluded that Yang was not entitled to relief based on his own independent opposi-

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Yang petitions for review of the BIA's decision on his asylum and withholding of removal claims.[1] He contends that: (1) the BIA's disparate treatment of lawfully married couples from traditionally married couples is a violation of the Equal Protection Clause; (2) the BIA's adverse credibility finding is not supported by the record; (3) the BIA's decision that Yang and Ling's marriage was not a spousal relationship was an unreasonable interpretation of the refugee statute, 8 U.S.C. § 1101(a)(42), and the *C-Y-Z-* decision; and (4) the BIA's conclusion that Yang had not been persecuted for resisting China's coercive population control program was not supported by the record.

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien in this country if he meets the definition of "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to re-

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[1] Yang has not sought review of the BIA's decision to deny him relief under the CAT. He has therefore abandoned that issue here. See *Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005).

> turn to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

*Id.* § 1101(a)(42). "[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . ." *Id.*

The BIA's factual determinations are reviewed under the substantial evidence test, and we must affirm the BIA's decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283-84 (11th Cir. 2001). The substantial evidence test is deferential and does not allow us to re-weigh the evidence from scratch. *Mazariegos v. Office of United States Att'y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001). The BIA's "decision can be reversed only if the evidence 'compels' a reasonable fact finder to find otherwise." *Sepulveda*, 401 F.3d at 1230 .

Yang first argues that BIA's disparate treatment of legally married couples from traditionally married couples violated the Equal Protection Clause. We cannot reach the merits of Yang's equal protection argument because he failed to exhaust his administrative remedies by raising it before the BIA. *Amaya-Artunduaga v. United States Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006) (petitioner failed to exhaust his administrative remedies where he did not

raise argument in notice of appeal or brief before the BIA). Accordingly, we lack jurisdiction to consider the argument now. *Id.* (the Court "lack[s] jurisdiction to consider a claim raised in a petition for review unless the petitioner exhausted his administrative remedies with respect thereto"); see also 8 U.S.C. § 1252(d) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . . ."). We will therefore dismiss this part of Yang's petition.

Yang's second contention is that the BIA's adverse credibility finding is not supported by the record. Specifically, Yang argues that inconsistencies between his initial interview at the airport and his later statements do not necessarily suggest, as the BIA concluded, that his later statements are not credible. Indeed, three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability. See *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) ("airport interviews only are useful and probative if they are reliable"); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible.")

We have had no occasion to address the reliability of airport interviews, and this case continues that trend. There was other evidence in the record supporting Yang's account of the events, but even assuming for present purposes that everything he said is true, he still has not met his burden to establish that the BIA's decision to deny him asylum and withholding of removal was not supported by substantial evidence, as we discuss below.

Yang next argues that the BIA's decision that only legal spouses are entitled to protection under the family planning provisions of the refugee statute, 8 U.S.C. § 1101(a)(42), is an unreasonable application of that statute. In its *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), decision, the BIA confirmed the INS' position that "the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution." *Id.* at 918. Quoting from a 1996 INS memorandum, the BIA said that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition." *Id.* at 917-18.

In its *In re S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006) (en banc), decision the BIA "decline[d] to extend [its] holding in *Matter of C-Y-Z-*, as modified, to unmarried applications claiming persecution based on a partner's abortion or sterilization." *Id.* at 4. "[W]e limit our holding to applicants who are legally married under Chinese law." *Id.* (footnote omitted). This limitation was necessary, the BIA said, because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried

father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives . . . ." *Id.* at 9. The BIA continued: "In the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement." *Id.* at 9-10.

Yang argues that the legal marriage requirement in *S-L-L-* is unreasonable. The BIA's interpretation of immigration statutes are due *Chevron* deference where appropriate. *Balogun v. United States Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005). "Under Chevron *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), where Congress in a statute has not spoken unambiguously on an issue, the interpretation of the statute by an agency entitled to administer it is entitled to deference so long as it is reasonable." *Mazariegos*, 241 F.3d at 1327 n. 4. "The degree of deference is especially great in the field of immigration." *Id.*

The decision to allow husbands to claim refugee status because their wives were forced to have abortions was based solely on the BIA's interpretation of the refugee statute in *C-Y-Z-* and *S-L-L-*, and not on anything Congress explicitly said in § 1101(a)(42). Because Yang concedes that he was not Ling's legal spouse, we have no occasion to decide whether the BIA's interpretation of the refugee statute is due *Chevron* deference. See generally *Lin v. United States Dep't of Justice*, 494 F.3d 296, 2007 WL

2032066 (2d Cir. July 16, 2007) (en banc) (rejecting the BIA's position that 8 U.S.C. § 1101(a)(42) extends automatic refugee status to spouses of individuals that the provision expressly protects). Instead, all we need decide is whether, assuming husbands of women who were forced to have an abortion are entitled to asylum for that reason, the BIA's decision to deny derivative protection to unmarried fathers of aborted children is unreasonable.

We conclude that it is not. As the Board noted in the S-L-L- decision, legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not. A legal husband, at least in the eyes of the government, shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives.

Furthermore, as the BIA observed, "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the Immigration and Nationality Act that 'it would seem absurd to characterize reliance on marital status in *C-Y-Z-* as arbitrary and capricious.' " *S-L-L-*, 24 I. & N. Dec. at 9 (quoting *Chen v. Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004)). We agree. Paternity of the baby is presumed when a woman gives birth in wedlock. As the BIA noted, determining paternity of the aborted baby is considerably more difficult, yet essential for asylum based on family planning refugee status, where the mother and father have no legal relationship. *Id.* at 10. Using marital status is "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance

of a forced abortion or sterilization on another person." *Id.* at 9 (quoting *Chen*, 381 F.3d at 227). Any other rule "would create numerous practical difficulties that the BIA might reasonably have chosen to avoid." *Id.* at 10 (quoting *Chen*, 381 F.3d at 228).

We recognize that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the family planning laws, then the couple should be considered married for the purposes of claiming asylum under the *C-Y-Z-* decision. *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). However, both of those decisions were rendered before the BIA's *S-L-L-* decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little persuasive value now. Having conducting our own Chevron analysis after *S-L-L-*, we find the requirement that an applicant be "legally married" to the mother of his aborted child to be reasonable for the reasons discussed above. Because Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under the provision in § 1101(a)(24) that "a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion."

Yang's final argument is that even if he was not legally married to Ling, he is still a refugee under the part of § 1101(a)(42) which grants protection to any "person . . . who has been persecuted for . . . other resistance to a coercive population control program." In *S-L-L-* the BIA explained:

> That the holding in *Matter of C-Y-Z-* is limited to legally married spouses does not mean that an unmarried applicant may never demonstrate past persecution in the context of a partner's forced abortion or sterilization . . . . [T]here may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to "other resistance to a coercive population control program."

24 I. & N. Dec. at 10.

BIA held that "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id.* In a follow up to *S-L-L-*, the Ninth Circuit held that an applicant establishes "resistance" where he "physically or vocally resisted birth control officials while the officials performed duties related to the birth control program." *Lin v. Gonzales*, 472 F.3d 1131, 1135 (9th Cir. 2007). However, "[i]n addition to meeting the nexus requirement based on 'resistance' to the family planning law, an applicant claiming persecution based on an unmarried partner's abortion must demonstrate that he has suffered harm amounting to persecution on account of that resistance." *S-L-L-*, 24 I. & N. Dec. at 10; see also *Lin*, 472 F.3d at 1135 ("Even though Lin resisted a coercive population control program, and thus satisfied the 'on account of political opinion' component of § 1101(a)(42)(B), this finding does not automatically establish persecution. Instead . . . Lin must also

demonstrate past persecution or a well-founded fear of future persecution.").

Finally, in determining whether an unmarried partner is in an extremely close and committed relationship with the pregnant mother, the BIA said one should look to:

> whether the couple has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (perhaps having taken such steps repeatedly, as where permission to marry has been denied by authorities based on failure to meet the minimum age requirements), is financially interdependent, and whether persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the U.S. is presented.

*S-L-L-*, 24 I. & N. Dec. at 10-11 (quotation omitted).

In this case, the BIA found that Yang "ha[d] not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner." Even assuming that the documentary evidence established that Ling and Yang had an extremely close and committed relationship and that Yang resisted family planning officials at the hospital where Ling was taken to have an abortion, the evidence does not compel the conclusion that Yang was persecuted on account of his resistance to Ling's abortion. The documentary evidence established: (1) that Yang had a physical altercation with family planning officials; (2) that Yang was

subpoenaed by the local security office; (3) the "cadres of the Family Planning Unit were looking for [Yang] and tried to arrest him"; and (4) "the Family Planning Officials and the Village Cadres are still looking for [Yang] and tried to arrest [him]."

This is insufficient to establish persecution. In *Zheng v. United States Attorney General*, 451 F.3d 1287 (11th Cir. 2006), we held that evidence the asylum petitioner had been detained by the Chinese government for five days but had suffered no injuries did not compel the conclusion that he had been persecuted. *Id.* at 1290-91. Here, Yang was not detained for any length of time and, as far as we can tell from the record, suffered no physical injuries from his encounter with the family planning officials. While Yang was subpoenaed and threatened with arrest for opposing China's family planning laws, the State Department's country report, in the section titled "Penalties and Rewards," stated that in the Fujian province where Yang is from, those who have more children than permitted are assessed a fine, but the Consulate General "did not find any cases of physical force actually employed in connection with abortion or sterilization. In interviews of Fujian visa applicants who had several children, U.S. Consular officers found many violators of the one-child policy paid fines; however, the officers had personally seen no forced abortion or property confiscation."

From this record, having suffered no prolonged detention or physical violence, and being at little risk of physical violence for having opposed the family planning laws if returned to China, we are not compelled to conclude that Yang was subject to past persecution or has a well-founded fear of future persecu-

tion. Accordingly, we will deny his petition to review the BIA's decision on his asylum claim.

Moreover, because there is no evidence compelling a finding that Yang was persecuted, he cannot meet the higher burden for withholding of removal by pointing to evidence compelling a finding that it is more likely than not that he will be persecuted upon his return to China. See *Al Najjar*, 257 F.3d at 1292-93 ("Where an applicant is unable to meet the 'well-founded fear' standard for asylum, he is generally precluded from qualifying for either asylum or withholding of [removal]."). We will therefore deny his petition to review the BIA's decision on his withholding of removal claim.

PETITION DISMISSED IN PART AND DENIED IN PART.

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 06-15742

Non-Argument Calendar

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Agency No. A77-977-849

YI QIANG YANG,

Petitioner

versus

U.S. ATTORNEY GENERAL,

Respondent

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Petition for Review of a Decision of the Board of Immigration Appeals

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**(July 12, 2007)**

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Yi Qiang Yang, a native and citizen of China, entered the United States illegally on September 28, 2001. While he was detained at the airport, immigra-

tion officials conducted an entrance interview. They asked Yang why he came to the United States. He said that he came because America was "better [than] China" and "the greatest country in the world," and he wanted "to earn a living." Yang was then asked whether he had any reason to fear returning to China. He said that he might be put in jail for not having a passport, but that he would not be harmed. However, Yang continued, he "really [did not] want to go back to China." When asked for his marital status, Yang said he was "single."

Yang was charged with removal for, among other things, failing to possess a valid entry document at the time he sought admission into the country, in violation of 8 U.S.C. § 1182(a)(7)(A)(i)(I). Yang conceded that he was removable based on this charge. He also applied for asylum, withholding of removal, and relief under the Convention Against Torture.

At his asylum hearing, Yang testified that he and Jiang Hui Ling had a "traditional marriage ceremony" with friends and family on July 15, 2000. They could not be formally married, according to Yang, because under Chinese law they were under the legal age-Yang was 20 and Ling was 17.

The couple discovered that Ling was pregnant in February 2001. Because they were not legally married, Yang said, the Chinese government would force Ling to have an abortion if it discovered that she was pregnant. To avoid detection, Yang and Ling hid at Yang's grandmother's house.

The government found out anyway. On July 3, 2001, family planning officials took Ling to the hospital to have an abortion. When Yang discovered that Ling was missing, he went to the hospital to free her.

Once there, five government officials began to beat Yang, but, according to him, he grabbed a broom, beat the officials off of him, and escaped.

Yang did not return to his home because the family planning officials were waiting for him there; the next day they sent a subpoena ordering that Yang come to the local security office. Yang later heard that Ling had been forced to abort the baby. He left China on September 25, 2001.

In addition to his testimony, Yang submitted corroborating evidence in support of his asylum petition. Among the exhibits introduced at the asylum hearing, Yang offered: (1) the State Department's country report on China; (2) a note from Lianjiang hospital, dated July 3, 2001, stating that Ling had an induced abortion; (3) a subpoena from the local security office, dated July 4, 2001, summoning Yang to its office the next day; (4) a receipt, dated July 2, 2000, for two wedding rings paid for by Yang; and (5) a letter from Yang's uncle stating that he attended Yang's "traditional wedding" on July 15, 2000, Yang and Ling were married by traditional means because "early marriage is forbidden," and when Ling was forcibly taken by family planning officials to have an abortion, Yang "tried to save his wife and fought with the officials."

Yang's exhibits also included an affidavit and a letter from Ling. The affidavit, dated March 10, 2005, stated that she and Yang "held a wedding according to the old traditional custom on July 15, 2000 . . . and started to live together without going through the marriage registration formalities." The letter, dated January 7, 2003, gave the following account of her marriage, pregnancy and abortion:

Dear Husband, do you still remember our wedding on July 15, 2000? Sometime after our marriage, in around February 2001, I did not feel good and went to see a doctor. It was then we found out I would give birth to our child . . . . But since China has a very strict checking system on Family Planning, we women have to have physical check up every three-month. On July 3rd, Mom called us and said she was very sick. We were very worry and afraid something might happen, so we rushed back to visit her. After you found out she was really sick, you sent her to the hospital immediately and left me home alone. At around 2 p.m. in the afternoon there came seven people. They claimed they were from the Family Planning Office and tried to take me away forcefully. Even though I tried to struggle and begged for their mercy, they would not bother to care. They took me to Lianjiang County Hospital and locked me up in a room. A moment later two nurses came inside. One of the nurses who had a syringe in her hand gave me a shot in my abdomen. After a few minutes, I had a very sharp pain in that area. And after my baby came out of my body, I saw the nurses put the poor baby in a plastic bag. I was so shock that I passed out. After I regain my consciousness, my mother told me that you tried to save me and fought with the officials of the Family Planning Office. The Cadres of the Family Planning Unit were looking for you and tried to arrest you.

The immigration judge found that Yang was not entitled to asylum because he had not established

that he was subject to past persecution or that he had a well-founded fear of future persecution. The IJ acknowledged that in *Matter of C-Y-Z-* the Board of Immigration Appeals held "that an alien who's [sic] spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act." But the IJ found that Yang had "failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in [his] country of China."

The IJ also found that Yang had "failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China." And, the IJ found that in Yang's "own mind he is single. That's why he answered the question regarding his marital status as being single."

The IJ concluded that Yang had "failed to establish . . . a spousal relationship between him and the person he described or referred to as his wife throughout his application." Therefore,

> even if the Court were to conclude that [Yang] was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he failed to show that they were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals['] [decision] in the *Matter of C-Y-Z-*, does not apply in [Yang]'s case.

The IJ also concluded as an alternative ground for denying Yang's petition that the encounter with family planning officials he described was not sufficiently serious to constitute persecution. As to any well-founded fear of future persecution, the IJ found Yang's testimony to be not credible, and therefore, according to the IJ, Yang had not presented sufficient evidence that "anyone in China is looking for him on account of a protected ground."

Because Yang had not met his burden as to asylum, the IJ concluded that he could not meet the higher burden for establishing entitlement to withholding of removal. And as to Yang's CAT claim, the IJ concluded that Yang had "failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country."

The BIA dismissed Yang's appeal of the IJ's decision. The BIA agreed with the IJ that "an applicant must have entered into a legally recognizable marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*.," and "[u]nderage couples living in de facto unregistered relationships are not recognized as married by the Chinese government."

The BIA also concluded that Yang was not entitled to relief based on his own independent opposition to China's population control program. The BIA agreed with the IJ that Yang was not credible given the inconsistencies between his initial airport interview and his asylum application. Therefore, the BIA concluded that Yang's testimony regarding his confrontation with the family planning officials was to be disregarded.

Yang petitions for review of the BIA's decision on his asylum and withholding of removal claims.[1] He contends that: (1) the BIA's disparate treatment of lawfully married couples from traditionally married couples is a violation of the Equal Protection Clause; (2) the BIA's adverse credibility finding is not supported by the record; (3) the BIA's decision that Yang and Ling's marriage was not a spousal relationship was an unreasonable interpretation of the refugee statute, 8 U.S.C. § 1101(a)(42), and the *C-Y-Z-* decision; and (4) the BIA's conclusion that Yang had not been persecuted for resisting China's coercive population control program was not supported by the record.

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien in this country if he meets the definition of "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

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[1] Yang has not sought review of the BIA's decision to deny him relief under the CAT. He has therefore abandoned that issue here. See *Sepulveda v. United States Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

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The BIA's factual determinations are reviewed under the substantial evidence test, and we must affirm the BIA's decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Al Najjar v. Aschroft*, [sic] 257 F.3d 1262, 1283-84 (11th Cir. 2001). The substantial evidence test is deferential and does not allow us to re-weigh the evidence from scratch. *Mazariegos v. Office of United States Att'y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001). The BIA's "decision can be reversed only if the evidence 'compels' a reasonable fact finder to find otherwise." *Sepulveda*, 401 F.3d at 1230 .

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1252(d) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . . ."). We will therefore dismiss this part of Yang's petition.

Yang's second contention is that the BIA's adverse credibility finding is not supported by the record. Specifically, Yang argues that inconsistencies between his initial interview at the airport and his later statements do not necessarily suggest, as the BIA concluded, that his later statements are not credible. Indeed, three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability. See *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) ("airport interviews only are useful and probative if they are reliable"); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) ("The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview's limitations when using its substance against an asylum applicant."); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998) ("That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible.")

We have had no occasion to address the reliability of airport interviews, and this case continues that trend. There was other evidence in the record supporting Yang's account of the events, but even assuming for present purposes that everything he said is true, he still has not met his burden to establish that the BIA's decision to deny him asylum and

withholding of removal was not supported by substantial evidence, as we discuss below.

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Here, Congress has not spoken unambiguously on the issue of whether husbands are permitted to step into their wives shoes for the purpose of family planning refugee status. The decision to allow husbands to claim refugee status because their wives were forced to have abortions was based solely on the BIA's interpretation of the refugee statute in C-Y-Z - and S-L-L-, and not on anything Congress explicitly said in § 1101(a)(42). Thus, we must determine whether the BIA's interpretation of "spouse" to include only those who are "legally married" was reasonable, giving great deference to the BIA's decision.

We conclude that the BIA's interpretation was reasonable. As the Board noted in the S-L-L- decision, legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not. A legal husband, at least in the eyes of the government, shares significantly more responsibility

in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives.

Furthermore, as the BIA observed, "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the Immigration and Nationality Act that 'it would seem absurd to characterize reliance on marital status in C-Y-Z- as arbitrary and capricious.' " *S-L-L-*, 24 I. & N. Dec. at 9 (quoting *Chen v. Ashcroft*, 381 F.3d 221, 227 n. 6 (3d Cir. 2004)). We agree. Paternity of the baby is presumed when a woman gives birth in wedlock. As the BIA noted, determining paternity of the aborted baby is considerably more difficult, yet essential for asylum based on family planning refugee status, where the mother and father have no legal relationship. *Id.* at 10. Using marital status is "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person." *Id.* at 9 (quoting *Chen*, 381 F.3d at 227). Any other rule "would create numerous practical difficulties that the BIA might reasonably have chosen to avoid." *Id.* at 10 (quoting *Chen*, 381 F.3d at 228).

We recognize that two circuits have held that when a couple has taken all the steps necessary to be married, including a traditional wedding, but are precluded from marrying due to the age requirements of the family planning laws, then the couple is married for the purposes of claiming asylum under the *C-Y-Z-* decision. *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). However, both of those deci-

sions were rendered before the BIA's *S-L-L-* decision interpreting the spouse requirement in *C-Y-Z-*, and therefore are of little precedential value. Having conducting our own Chevron analysis after *S-L-L-*, we find the requirement that an applicant be "legally married" to the mother of his aborted child to be reasonable for the reasons discussed above.

Accordingly, following *S-L-L-*, we hold that for a male to claim refugee status pursuant to the provision in § 1101(a)(42) that "a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion," he must be "legally married" to the mother of his aborted baby under the laws of his native country. Because Yang and Ling's traditional marriage was not recognized under the laws of China, Yang cannot claim refugee status under the provision.

Yang's final argument is that even if he was not legally married to Ling, he is still a refugee under the part of § 1101(a)(42) which grants protection to any "person . . . who has been persecuted for . . . other resistance to a coercive population control program." In *S-L-L-* the BIA explained:

> That the holding in *Matter of C-Y-Z-* is limited to legally married spouses does not mean that an unmarried applicant may never demonstrate past persecution in the context of a partner's forced abortion or sterilization . . . . [T]here may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to "other resistance to a coercive population control program."

24 I. & N. Dec. at 10.

BIA held that "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id.* In a follow up to *S-L-L-*, the Ninth Circuit held that an applicant establishes "resistance" where he "physically or vocally resisted birth control officials while the officials performed duties related to the birth control program." *Lin v. Gonzales*, 472 F.3d 1131, 1135 (9th Cir. 2007). However, "[i]n addition to meeting the nexus requirement based on 'resistance' to the family planning law, an applicant claiming persecution based on an unmarried partner's abortion must demonstrate that he has suffered harm amounting to persecution on account of that resistance." *S-L-L-*, 24 I. & N. Dec. at 10; see also *Lin*, 472 F.3d at 1135 ("Even though Lin resisted a coercive population control program, and thus satisfied the 'on account of political opinion' component of § 1101(a)(42)(B), this finding does not automatically establish persecution. Instead . . . Lin must also demonstrate past persecution or a well-founded fear of future persecution.").

Finally, in determining whether an unmarried partner is in an extremely close and committed relationship with the pregnant mother, the BIA said one should look to:

> whether the couple has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (per-

> haps having taken such steps repeatedly, as where permission to marry has been denied by authorities based on failure to meet the minimum age requirements), is financially interdependent, and whether persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the U.S. is presented.

*S-L-L-*, 24 I. & N. Dec. at 10-11 (quotation omitted).

In this case, the BIA found that Yang "ha[d] not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner." Even assuming that the documentary evidence established that Ling and Yang had an extremely close and committed relationship and that Yang resisted family planning officials at the hospital where Ling was taken to have an abortion, the evidence does not compel the conclusion that Yang was persecuted on account of his resistance to Ling's abortion. The documentary evidence established: (1) that Yang had a physical altercation with family planning officials; (2) that Yang was subpoenaed by the local security office; (3) the "cadres of the Family Planning Unit were looking for [Yang] and tried to arrest him"; and (4) "the Family Planning Officials and the Village Cadres are still looking for [Yang] and tried to arrest [him]."

This is insufficient to establish persecution. In *Zheng v. United States Attorney General*, 451 F.3d 1287 (11th Cir. 2006), we held that evidence the asylum petitioner had been detained by the Chinese government for five days but had suffered no injuries did not compel the conclusion that he had been persecuted. *Id.* at 1290-91. Here, Yang was not detained

for any length of time and, as far as we can tell from the record, suffered no physical injuries from his encounter with the family planning officials. While Yang was subpoenaed and threatened with arrest for opposing China's family planning laws, the State Department's country report, in the section titled "Penalties and Rewards," stated that in the Fujian province where Yang is from, those who have more children than permitted are assessed a fine, but the Consulate General "did not find any cases of physical force actually employed in connection with abortion or sterilization. In interviews of Fujian visa applicants who had several children, U.S. Consular officers found many violators of the one-child policy paid fines; however, the officers had personally seen no forced abortion or property confiscation."

From this record, having suffered no prolonged detention or physical violence, and being at little risk of physical violence for having opposed the family planning laws if returned to China, we are not compelled to conclude that Yang was subject to past persecution or has a well-founded fear of future persecution. Accordingly, we will deny his petition to review the BIA's decision on his asylum claim.

Moreover, because there is no evidence compelling a finding that Yang was persecuted, he cannot meet the higher burden for withholding of removal by pointing to evidence compelling a finding that it is more likely than not that he will be persecuted upon his return to China. See *Al Najjar*, 257 F.3d at 1292-93 ("Where an applicant is unable to meet the 'well-founded fear' standard for asylum, he is generally precluded from qualifying for either asylum or withholding of [removal]."). We will therefore deny his pe-

tition to review the BIA's decision on his withholding of removal claim.

PETITION DISMISSED IN PART AND DENIED IN PART.

## APPENDIX C

FILE: A77 849 – ORLANDO

DATE: Oct. 2, 2006

IN RE: YI QIANG YANG a.k.a.

Edmond Chen a.k.a. Yi Chang Yong

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Theodore Cox, Esquire

ON BEHALF OF DHS:
Richard A. Jamadar
Assistant Chief Counsel

CHARGE:

File: A77 849 – Orlando

Date: Oct. 2, 2006

Notice:

Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] Fraud or willful misrepresentation of a material fact

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] False claim of United States citizenship

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document

APPLICATION:

Asylum; withholding of removal; relief under the Convention Against Torture

The respondent has appealed from the Immigration Judge's decision dated April 29, 2005. We concur with the Immigration Judge that the respondent has not met his burden of proving eligibility for the relief sought. The respondent, a native and citizen of the People's Republic of China, bases his claim on the involuntary abortion of a woman that he claims he married in a traditional marriage ceremony.

We have found that an applicant must have entered into a legally recognized marriage in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (an alien whose spouse was forced to undergo an involuntary abortion or sterilization procedure can establish persecution on account of political opinion). *Matter of S-L-L-*, 24 I&N Dec. 1, 12 (BIA 2006).[1] Underage couples living in de facto unregistered relationships are not recognized as married by the Chinese government. *Id.* at n.13. Accordingly, *Matter of C-Y-Z-, supra*, does not apply to the respondent's case.

In the absence of a qualifying marital relationship, an applicant must show that he has suffered or will suffer persecution on account of "other resistance to a coercive population control program" within the meaning of section 101(a)(42) of the Act. *Matter of S-L-L-, supra*. In this case, the respondent claims that he confronted local authorities after his partner's abortion, that he was subsequently subpoenaed, and that authorities visited his home. We find no clear

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[1] We recognize that two circuit courts have held to the contrary where the applicant has entered into a traditional marriage. *Matter of S-L-L-, supra*, at n. 14; *see also Zhang v. Gonzalez*, 434 F.3d 993 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004).

error in the Immigration Judge's conclusion that the respondent did not testify credibly on these points, however, particularly where he did not describe any of these incidents during his airport interview (Exh. 18).

The testimony of an applicant, if found to be credible, is alone sufficient to establish eligibility for asylum. *D-Muhumed v. United States Attorney General*, 388 F.3d 814, 818-19 (11th Cir. 2004). However, inconsistent or embellished testimony could lead to an adverse credibility finding. *Dailide v. United States Attorney General*, 387 F.3d 1335, 1343 (11th Cir. 2004) (affirming the BIA's adverse credibility determination, which was based upon its finding that the applicant's testimony conflicted with his answers to interrogatories, affidavit, deposition, and other documentary evidence). Although uncorroborated but credible testimony may be sufficient to sustain an applicant's burden of proving eligibility for asylum, "[t]he weaker an applicant's testimony [ ] the greater the need for corroborative evidence." *Yang v. United States Attorney General*, 418 F.3d 1198, 1201 (11th Cir. 2005). However, "an adverse credibility determination does not alleviate the IJ's duty to consider other evidence produced by an asylum applicant," and the IJ must provide "specific, cogent reasons" for her credibility finding. *Forgue v. United States Attorney General*, 401 F.3d 1282, 1287 (11th Cir. 2005).

In the case before us, the Immigration Judge relied on the respondent's sworn airport statement. Although the respondent argues that airport statements are not reliable, the United States Court of Appeals for the Eleventh Circuit, under whose jurisdiction this case arises, has not made such a finding.

The respondent argues that he was intimidated during the airport interview. We note, however, that the interview was conducted in Mandarin, the respondent was apprised of his rights before his statement was taken, and he was repeatedly asked whether he feared returning to China (Exh. 18). Under these conditions, we do not find the Immigration Judge's reliance on the airport statement to be improper. The omissions from the airport statement raise significant doubts as to the respondent's credibility and, even considering the evidence provided by the respondent in support of his claim, we find no clear error in the Immigration Judge's determination that he did not testify credibly.

Consequently, we find that the respondent has not met his burden of proving his persecution claim on account of his own resistance to a coercive population control program or resistance to the alleged forced abortion of his partner. We therefore agree with the Immigration Judge that the respondent has failed to meet his burden of proof for asylum, as well as the higher burdens for withholding of removal and protection pursuant to the Convention Against Torture. *See INS v. Stevic*, 467 U.S. 407 (1984); 8 C.F.R. § 1208.16(b); 8 C.F.R. § 1208.16(c)

ORDER: The appeal is dismissed.

*/s/ Brian M O'Leary*
FOR THE BOARD

## APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Orlando, Florida
File A77 977849
April 29, 2005
In the Matter of
YANG, YI QIANG
Respondent
IN REMOVAL PROCEEDINGS
ON BEHALF OF RESPONDENT
Agnes Chau, Esquire
ON BEHALF OF DHS
Cori White, Esquire
Assistant Chief Counsel

CHARGE: Section 212 (a)(6)(C)(i) of the Immigration and Nationality Act, as any alien who by fraud or willful misrepresenting a material fact seeks to procure or has sought to procure a visa, other documentation or entry into the United States or other benefit provided under the Act.

Section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, in that you're an alien who falsely represents or has falsely represented himself or herself to be a citizen of the United States for any purpose or benefit under this Act.

Section 212(a)(7)(A)(i) of the Immigration and Nationality Act, as an immigrant who at the time of application for admission is not in possession of a

valid, unexpired immigrant visa or reentry permit, border crossing identification card or other valid entry documents required by the Act and a valid unexpired passport or other suitable travel document or document of identity and nationality as required under regulations issued by the Attorney General under Section 211(a) of the Immigration and Nationality Act.

APPLICATIONS: Under Section 208 of the Immigration and Nationality Act, political asylum, Section 241(b)(3) of the Immigration and Nationality Act, and withholding of removal. The respondent is also seeking relief under the United Nations Convention Against Torture.

ORAL DECISION OF
THE IMMIGRATION JUDGE

The respondent was issued with this Notice to Appear which is dated October 5th, 2001. The Notice to Appear states that the respondent is a native and citizen of China and that he arrived at the Los Angeles, California, airport on or about September 20, 2001, and applied for admission. Allegation states that the respondent fraudulently or willfully misrepresented a material fact in seeking to procure documentation or entry into the United States in that he presented himself as a U.S. citizen, presenting an altered U.S. passport in the name of Chen, Edmond, date of birth 7-26-75, a naturalized Vietnamese national. And allegation number 8 states that he did not possess or present a valid immigrant visa, reentry permit or the border crossing identification card or other valid document to enter the United States.

The respondent, through counsel, has admitted allegations with the 1 through 4, 5 and 6 and 8.

However, the respondent is denying allegation number 7, and he is also denying the two charges under Section 212(a)(6)(C)(i) and (ii) but he's conceding the charge under Section 212(a)(7)(A)(i)(I).

The respondent submitted an affidavit in connection with the allegation number 7, and the two charges that he's denying. This affidavit has been marked as Exhibit 3 of the court's record. In this statement the respondent states that he did not know where the passport that he traveled into the United States came from nor the content of the passport. The officer stated that when he passed through immigration he told the officer in Chinese that the passport was not his but the officer did not understand him so he brought him in front of a Chinese interpreter. He also told the Chinese interpreter that the passport did not belong to him. Then the interpreter brought him to the Immigration Office inside the airport where they took his affidavit. He also stated that he did not present himself as a United States citizen or falsely represented himself to be a citizen of the United States. He also stated that since he did not read, write nor speak English he did not know the passport he was holding was in fact a United States passport.

The respondent testified in court about the passport and how he obtained the passport. He testified that he took passport sized pictures and gave them to the person who helped him to get the passport and other documentation for his travel to the United States. The respondent confirmed in court that the photograph in the passport is in fact his photograph and this is the photograph that he gave to the snakehead. The respondent also informed the Court that he did not know what was in the passport and

he also did not open the passport to know what was in the passport. The Court found the respondent's testimony in court to be consistent with the respondent's claim that he did not know what was in the passport or the name in the passport or what was in the passport. In the sense that the respondent, according to the airport statement which has been marked as Exhibit 18 of the court's record, when he was referred to Edmond Chen said that in response to the question whether he's been known by any names he stated that was not his name. He answered but then he said Edmond Chen but that is not his name. The record shows that the question was if you are not known by any other name and what was the name in the U.S. passport that you presented to Immigration for inspection today and he said Edmond Chen but that is not my name.

The respondent also testified inconsistently when he informed the Court that when he arrived at the airport in the United States it was inspector who shout out his name to him. That was when he knew that that was the name in the passport. This is again inconsistent with the information in the statement. If the respondent at that time had not even handed the passport to the official how would the official know that that was the name in the passport. Later on the respondent changed his testimony and said that the inspector actually approached him or as he described it went at him or approached him, in effect, and that is how he knew that he was the one that the inspector was asking for or calling. The Court also notes that according to the respondent's information he took the passport size photographs and gave them to the person who prepared the documents for him to put in the passport for him. Today he denied that he did not know how this photograph got into the pass-

port and the Court did not find him to be believable. In view of these inconsistencies and the fact that the passport shows clearly that the respondent's photograph is in the photograph and he's also confirmed that, the Court concludes that the respondent willfully misrepresented a material fact in seeking to enter the United States. Also by presenting the passport, United States passport, which he intentionally took a picture to be provided with, he presented himself as a United States citizen. It is clear that the passport was altered by the insertion of the respondent's photograph. I therefore conclude that allegation number 7 has been established and based upon that I will sustain the two charges of removability under Section 212 (a)(6)(C)(i) and Section 212 (a)(6)(C)(ii) of the Immigration and Nationality Act.

Since he has already conceded the third charge of removability I conclude that the respondent's removability has been established on all the charges in the Notice to Appear. The Court notes that copy of the page of the passport with the respondent's photograph has been marked as Exhibit 24, and is part of the record. The Court also concludes that the respondent's removability has been established as charged, based upon the three charges of removability.

The respondent is seeking asylum, withholding of removal and also relief under the United Nation's Convention Against Torture. The respondent submitted an application on Form I-589 which has been marked as Exhibit 2 of the court's record. He submitted a first statement which was marked as Exhibit 2A, and then he submitted an amendment to the statement which was marked as Exhibit 2B. The respondent submitted the statement in connection with

the charges which was marked as Exhibit 3. He submitted additional documents, birth certificate marked as Exhibit 4. Pictures showing male and female, he stated that this was a picture of him and his spouse, is marked as Exhibit 5. Subpoena is marked as Exhibit 6. A document described as induced abortion document marked as Exhibit 7. These documents will be admitted into evidence. The birth certificate will be given full weight but the picture and the subpoena and the induced abortion documents will not be given weight. The Court will just accept the picture of the respondent and another female person, not necessarily his wife. With respect to the subpoena, the Court questions the authenticity of that document since the respondent did not even mention this document when he first arrived in the United States, at the airport. Also the induced abortion, since he did not even mention this upon his first arrival at the airport when he was questioned, as reflected in Exhibit 18 of the court's record. The other documents include background documents marked as group Exhibit 8. Copies of decisions marked as Exhibit 9. Birth certificate of person he describes as his wife marked Exhibit 10, which will be admitted just show what is the document. The document purporting to be a receipt for rings that the respondent bought is marked Exhibit 11, to be just admitted to show what is in this but not to show that this was a receipt for rings that the respondent bought for his wedding. The respondent submitted letters purporting to be from his spouse's uncle. These are marked as Exhibit 12 and 13, respectively. This will also be admitted into evidence but not for the truthfulness of the information in those documents. Exhibit 14, also purports to be a notarial statement by the wife. This will also be admitted but not for the truthfulness of

the information in this document. The envelope submitted will group together as group Exhibit 15. Amendments to translations, certification, etcetera are grouped together as group Exhibit 16. Affidavit is marked as Exhibit 17 just to be admitted as part of the background information in this matter.

The Department of Homeland Security submitted the record of sworn statement which I have referred to and is marked Exhibit 18. The credible fear interview package marked as Exhibit 19. The human right's report on China marked as 20. The profile marked as 21. The Court also marked into evidence a custom's declaration form and also the calendar for the year 2000, as 22 and 23. All of these will be admitted into evidence. The respondent's counsel did not object to the admission of any of these documents into evidence.

The issue of removability having been resolved, the sole issue before the Court is whether the respondent's application for relief from removal should be granted.

APPLICABLE LAW FOR ASYLUM

In order to establish his statutory eligibility for asylum under Section 208 of the Immigration and Nationality Act, the respondent has to show that he qualifies as a refugee as defined in Immigration and Nationality Act. Section 101(a)(42) of the Immigration and Nationality Act defines a refugee as a person who is unwilling or unable to return to his country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The definition of a refugee was expanded by an amendment to the Immigration and

Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 101(a)(42) in part defines a refugee to include an alien who has been forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for resistence to a coercive birth control program. Such a person is deemed to have been persecuted on account of his or her political opinion. The Board of Immigration Appeals has held in the *Matter of X-P-T-*, that this new provision supercedes the Board's decision in the *Matter of Change*. The burden is on the respondent to establish that he qualifies as a refugee as defined in Immigration and Nationality Act.

The respondent's application for political asylum also serves as an application for withholding of removal. In order to establish his statutory eligibility for withholding of removal he has to show by a clear probability of the evidence that his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion. The respondent bears the burden of establishing that his life or freedom would be threatened on account of one of the grounds specified for the grant of withholding of removal if he were to return to his country.

SUMMARY OF FACTS

The respondent submitted an application, Form I-589, and he provided the following information in his application. This is marked as Exhibit 2. He provided his date of birth as 11-5-1978, the city as Fuzhou and the country as China. The respondent answered questions in other parts of his application. In the part for spouse he named a female person and he did not indicate that this person is in the United

States, in fact he indicated that this person is in China. He stated the place of marriage as Fozhou City and the date of marriage as 7-15-2000. He did not name any children. He finally stated that he does not have any children.

In response to the question why he's applying for asylum or withholding he marked the box for political opinion. He answered yes to the question whether he or any members of his family have been mistreated and he referred to the affidavit. He also answered yes to a question whether he fears harm if he were to return to his country. He answered yes to the question whether he or any members of his family have been charged, arrested, detained.

In the statement that the respondent submitted to the court which is marked as Exhibit 2B, the Court notes that the respondent's first statement marked as Exhibit 2A, is essentially the same as 2B. 2B is the amended statement. So the Court is relying on this amended statement. In Exhibit 2B, in summary, the respondent stated that he's requesting asylum for himself because of the fear of persecution if he were to return to China. He stated that his claim is based on his past persecution and fear of continued persecution due to his political opposition to China's coercive family planning policy. The respondent stated that he and the wife were married traditionally after they dated for a couple of years. They could not register their marriage because both of them had not reached the legal age of marriage. The respondent stated, however, the wife got pregnant and it was discovered and she was taken for an abortion. He went on to provide the details about what happened to him in China and he stated in part that the marriage took place on July 15th, 2000.

At that time he was 21 years old and the wife was just only 18 years old. The respondent stated that in China at that time the legal age for marriage for a man was 22 and for a woman was 20. Because they had not reached the legal age for marriage they could not apply for marriage license.

The respondent stated that in February of 2001, the wife became sick and the doctor confirmed that she was pregnant. The respondent also stated that because of the Chinese government strict family planning policy he and the wife went into hiding and went to stay at a grandmother's house. The respondent stated on July 3rd, 2001, his mother called him about being sick. They went there with his wife later and when he left his wife at the mother's home the cadres went to the house, took the wife to the hospital and the wife was eight months pregnant at that time and she was forced to undergo abortion. Respondent stated that he went to the family planning office and argued with the cadres and later on after confrontation he was able to get away. The respondent then stated that a subpoena was issued for him to report at the public security bureau on July 5th, 2001, but he didn't go. He came to the United States and then he provided information on the trip to the United States.

The respondent testified in support of his application. In summary he testified that he's 28 years old. He testified that he's married and the marriage took place on July 15, 2000. He testified, however, that he does not have a marriage certificate. He testified today that the wife is in China and she's 23 years old. He also confirmed that he does not have any children. The respondent testified that he and the wife married according to traditional custom and

they invited friends and family to witness. The respondent testified about 2,000 people live in the village that he lives in and that the tradition for them to undergo this kind of ceremony when they couldn't register and get a permit to marry. The respondent testified that they could not get the permit to get married because they had not reached the legal marriage age. The respondent also testified that at the ceremony he and the wife brought tea to the mother and then they drank and celebrated their marriage with friends and family.

The respondent then testified that the wife became pregnant in February 2001. He also testified that in China you are not allowed to have a child if you don't have a marriage certificate. Therefore he and the wife went to hide in the grandmother's house. The respondent testified that the wife was given a forced abortion on July 3rd, 2001. This was after he left the wife in the mother's home and upon the return the neighbors told him that the wife had been taken away from the family planning officials. He went to look for these people and there a confrontation ensued. The respondent was able to run away. Later on a subpoena was issued for his arrest. The wife told him about what happened to her, about how the abortion took place. The respondent testified that a subpoena was sent to him on July 4, 2001, for him to report at the family planning office on July 5, 2001. He did not show up. He left China on September 25, 2001, and arrived in the United States on September 28, 2001.

The respondent identified the photograph marked as Exhibit 5. He said that was a photograph of him and his wife. He also identified the document described as subpoena and he said that the mother

sent it to him. The respondent identified a document described as abortion certificate and he said that the wife asked the hospital for it.

The respondent also testified about his arrival in the United States. He testified that the snakehead gave him the passport to board the plane and he did not know what was in the passport. He described that his education level was through the junior high.

The respondent answered questioned posed by the Government counsel on cross-examination and answered a few questions posed by the Court. He confirmed that the interview, when he arrived at the airport, interpreter was an interpreter in the Mandarin language.

FINDINGS OF THE COURT

The Court concludes that the respondent has failed to present to the Court credible and sufficient evidence to establish that he was a victim of past persecution on account of his political opinion or any of the grounds specified for a grant of asylum in the United States. The Court also concludes that the respondent has failed to present credible and sufficient evidence to establish that he has a well-founded fear of future persecution on account of any of the grounds specified for the grant of asylum in the United States.

The Court also makes an adverse credibility finding in the respondent's case based upon the reasons that will be stated as follows.

The respondent's claim is that he's a native and citizen of China and that, according to his testimony in court today, he's married but he married his wife according to the traditional custom in China. He provided information that he and the wife couldn't regis-

ter their marriage because the respondent and the wife had not reached the legal age of marriage. He stated that at that time in China the legal age of marriage for a man was 22 and for a woman was 20. At that time, according to his testimony he, the respondent, was 21 and the wife was just shy of 18 years, in his own words.

He provided information that in February 2001, the wife got sick and when they went to see a doctor it was discovered that the wife was pregnant. The respondent also testified that in China women cannot give birth to a child if she doesn't have a marriage license. Because of that he and the wife went into hiding. Later on when the mother was sick and they went to see the mother, the wife was dragged by the family planning cadres to the hospital for a forced abortion. The respondent provided information and testified that when he went to check on the wife he had a confrontation with the cadres. He was able to flee. Later a summons was issued for him to report to the public security office but he did not. Arrangements were made for him to come to the United States.

Respondent testifies that he fears returning because he fears harm from the family planning officials and authorities in China if he were to return to China.

The respondent submitted application on Form I-589 with the statement marked as Exhibit 2A and 2B, and he submitted documents and testified in support of his application.

With respect to past persecution the respondent is relying on an alleged forced abortion performed on the person that he described as his wife to establish

that he was a victim of past persecution. The Court notes that the Board of Immigration Appeals in the *Matter of C-Y-Z-*, held that an alien who's spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of that word under Section 101(a)(42) of the Immigration and Nationality Act. In that case the applicant presented evidence that the wife was forced to undergo sterilization procedure under the Chinese government's birth control policy. He also submitted a marriage certificate to confirm that he and the wife were actually and legally married in China. The respondent in *Matter of C-Y-Z-*, established a spousal relationship between him and his wife.

In this respondent's case the respondent has made references to his wife in his statement and also during his testimony today. The respondent informed the Court that he and the wife were married according to traditional custom in China. Therefore he did not produce a marriage certificate in support of his application. The respondent also testified that he and the wife did not register their marriage because they had not reached the legal age of marriage at the time that they got married. The respondent also did not provide a notarial certificate from a member of the village committee or any official to confirm that this marriage took place. The respondent submitted a statement by the wife or a notarial statement by the wife confirming that he and respondent entered into a traditional marriage. In fact this purports to be from his wife.

The Court also notes that the respondent himself testified that as part of the ceremony he and the wife

presented tea to the respondent's mother yet there's no statement or affidavit from the mother confirming the same. The respondent, however, submitted a statement purporting to be a statement from the respondent's uncle. He did not explain why he did not submit a statement from the person who he describes as his wife's family, parents of the respondent's own parents to prove that they in fact entered into this traditional marriage. They also did not provide any pictures of their marriage ceremony.

I therefore conclude that the respondent has failed first of all to prove that he and this person he describes as his wife entered into a traditional marriage in the respondent's country of China.

The Court notes that even if the respondent had been able to provide evidence to show, that he and the person he describes as his wife were married according to traditional custom in China he has failed to present anything to the Court to show that traditional marriages are legal in China and recognized by the government of China. The Court also notes that the respondent's own information that he provided in the sworn statement marked as Exhibit 8 of the court's record, reflects that the respondent stated that he was single upon his arrival in the United States. The respondent testified in court that in the United States he considers himself single but in China he's married. That cannot be that kind of situation. A person is either married or single and the Court concludes that in the respondent's own mind he is single. That's why he answered the question regarding his marital status as being single.

In view of all the above the Court concludes that the respondent has failed to establish that a spousal relationship between him and the person that he de-

scribed or referred to as his wife throughout his application and the statement that he submitted in support of his application. Therefore even if the Court were to conclude that the respondent was able to prove that the person he refers to as his wife was forced to undergo abortion he cannot benefit from that. The reason is that he has failed to show that they were legally married and the decision in the *Matter of C-Y-Z-*, applies only where a spousal relationship has been established between the respondent and the spouse. The Court concludes that the Board of Immigration Appeals in the *Matter of C-Y-Z-*, does not apply in the respondent's case. He has therefore failed to establish that he was a victim of past persecution by virtue of this person's alleged forced abortion.

The Court also concludes that the respondent has also failed to prove that he suffered past persecution on account of his encounter with the family planning officials. He did not present any evidence to show that he suffered any serious injuries as a result of being detained by the family planning officials. There's no evidence that the respondent was arrested or detained or that he suffered any harm at the hands of the Chinese government or a group of persons that the Chinese government is unwilling or unable to control. Therefore he has failed to establish that he was a victim of past persecution on account of a protected ground.

The Court also concludes that the respondent has also failed to present credible and sufficient evidence to establish that he has a well-founded fear of future persecution on account of any of the grounds specified for the grant of asylum in the United States. I find that the respondent failed to present

consistent and sufficient evidence to establish that anyone in China is looking for him on account of a protected ground. The respondent described a confrontation with the cadres and testified that a summons or subpoena was issued for his arrest, yet the Court notes again that when the respondent first arrived in the United States and was questioned at the airport he did not provide this information that he had a wife or that the wife was forced to undergo an abortion and that officials were looking for him. He did not mention that a subpoena had been issued for his arrest. Failure to mention all of these, when first questioned at the airport in the United States cast doubt on the respondent's credibility. The Court notes that the credible fear interview later, the respondent said that he was too scared to mention that and he repeated the same in court. This is not a convincing explanation. The Court did not find the respondent to be believable especially in view of the inconsistencies in the respondent's testimony in court today.

The inconsistencies regarding how the passport was obtained and whether or not he knew what was in the passport and that he knew that he was carrying a United States passport when he was a willing participant in providing the photograph, a passport sized photograph, for this passport to be prepared is also inconceivable that the respondent wouldn't know that he was carrying a passport for his admission to the United States. He also lied about even knowing the name in the passport. The respondent's testimony was entirely inconsistent regarding when and how he got to know that the name in the passport was Edmond Chen. His testimony in court has been found to be inconsistent with information in Exhibit 18. The respondent claimed that he did not

open the passport yet he knew the name Edmond Chen. His testimony was entirely inconsistent because he changed his story in court today and he said that, first he said that he got to know about the name when the inspector waived the passport at him. Yet he was not able to tell the Court at what time that happened. He said that he presented the passport to the inspector and said that that wasn't his passport. So this is inconsistent with his statement in court. Also when he was questioned further about this the respondent said that the inspector, K. Martin, that was her name, he knew that that was the name in the passport.

In view of all the above and having considered all the evidence in the record the Court concludes that the respondent has failed to establish that he qualifies as a refuge as defined in the Immigration and Nationality Act. He also failed to establish his statutory eligibility for the grant of asylum in the United States.

It is not necessary for me to address the question of whether the respondent merits a favorable exercise of discretion. I will make an adverse credibility finding in his case based upon the inconsistencies that are outlined above. Another significant inconsistency is the fact that the respondent testified that his alleged traditional marriage on July 15, 2000, fell on a Tuesday or took place on a Tuesday. The Government counsel submitted the calendar for 2000, and it shows that July the 15, 2000, actually fell on a Saturday. That's an inconsistency. The credibility of the respondent is of extreme importance in assessing his claim for political asylum and in determining the credibility of the respondent. I've taken into account his demeanor while testifying and the fact that he

was able even to change his story as he went along when he was confronted with inconsistencies and answers that he had already given to questions. The Court therefore took into account the rationality, internal inconsistency and persuasiveness in his testimony and if any of these facts were true would satisfy the standard of eligibility for the relief that the respondent is seeking and the Court did not find that to be the case. Therefore the Court makes adverse credibility finding and his application for political asylum will be denied.

In the same vein, the Court will deny the respondent's application for withholding of removal. The Court concludes that he has failed to present credible and sufficient evidence to establish that his life or freedom would be threatened on account of a protected ground if he were to return to his country, China.

Furthermore since he failed to satisfy the lower burden required for asylum he has also failed to satisfied the higher burden required for withholding of removal and his application for withholding of removal will also be denied.

The respondent is also seeking relief under the United Nation's Convention Against Torture. An applicant is entitled to withholding and deferral of removal if the applicant can sustain his burden of proof to show that it is more likely than not that he would be tortured if removed to the proposed country of removal. In the respondent's case I find that he failed to establish that he was tortured in his country or that it is more likely than not that he would be tortured if he were to return to his country. Therefore his request for relief under the United Nations Convention Against Torture will also be denied.

And the following order will be entered;

ORDER

IT IS HEREBY ORDERED that the respondent's application for political asylum be denied.

IT IS HEREBY FURTHER ORDERED that the respondent's application for withholding of removal be also denied.

IT IS HEREBY FURTHER ORDERED that the respondent's request for relief under the United Nations Convention Against Torture be also denied.

IT IS HEREBY FURTHER ORDERED the respondent shall be removed from the United States to the country of the respondent's citizen, China, on the three charges in the respondent's Notice to Appear.

*/s/ Victoria Ghartey*
Victoria Ghartey
Immigration Judge

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(2)

No. 07-756

FILED
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SUPREME COURT, U.S.

# In the Supreme Court of the United States

YI QIANG YANG, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in holding that a person who is not legally married to a person who was forced to undergo an abortion pursuant to a coercive population control policy, but participated in a traditional marriage ceremony with that person, is not automatically eligible for "refugee" status under 8 U.S.C. 1101(a)(42).

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# In the Supreme Court of the United States

No. 07-756

YI QIANG YANG, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 494 F.3d 1311. The decisions of the Board of Immigration Appeals (Pet. App. 35a-38a) and the immigration judge (Pet. App. 39a-58a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 8, 2007. On October 30, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 6, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General

may grant asylum to an alien who qualifies as a "refugee" under 8 U.S.C. 1101(a)(42). A "refugee" is a person who is unable or unwilling to return to his or her native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1101(a)(42)(A); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987).

In 1989, the Board of Immigration Appeals (BIA) rejected an asylum applicant's claim that implementation of China's "one couple, one child" policy, even if it results in the applicant's involuntary sterilization, is persecution or creates a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989).

In 1996, Congress amended the INA's definition of "refugee" to include the following:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. 1101(a)(42); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 601(a), 110 Stat. 3009-689;

see also H.R. Rep. No. 469, 104th Cong., 2d Sess. 173 (1996) (stating that IIRIRA § 601(a), 110 Stat. 3009-689, was enacted in response to the *Chang* decision).

The BIA has held that the spouse of a person who has been forced to undergo an abortion or sterilization may qualify for asylum under the revised definition of "refugee" in 8 U.S.C. 1101(a)(42). See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917-918 (B.I.A. 1989) (en banc). But the BIA has limited that rule to asylum applicants who are legally married and who opposed the spouse's abortion or sterilization. See *In re S-L-L-*, 24 I. & N. Dec. 1, 3-8 (B.I.A. 2006) (en banc), aff'd *sub nom.*, *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 314 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007).

In particular, the BIA has declined to extend asylum eligibility to boyfriends and fiancees of those who are subject to coercive population control practices, explaining that "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *S-L-L-*, 24 I. & N. Dec. at 9. For the same reasons, the BIA also has declined to extend asylum eligibility to applicants who were not married legally but participated in traditional marriage ceremonies with a person forced to undergo an abortion or sterilization. *Id.* at 12. The BIA has noted, however, that unmarried partners may establish asylum eligibility by demonstrating that they have been or will be persecuted for *their own* resistance to a coercive population control program. *Id.* at 10; see 8 U.S.C. 1101(a)(42) ("[A] person * * * who has been persecuted * * * for other resistance to a coercive population control program, shall be deemed

to have been persecuted on account of political opinion.").

2. Petitioner, a native and citizen of the People's Republic of China, entered the United States illegally in 2001. Pet. App. 40a. He sought admission to the United States by presenting a false United States passport. *Ibid.* When interviewed by an immigration officer, petitioner stated that he was single, that he had no children, and that his only fear about being returned to China was that he "might be put in jail" because he did not have a passport. *Id.* at 2a, 19a, 37a-38a, 53a.

Petitioner was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or by willful misrepresentation of a material fact; under 8 U.S.C. 1182(a)(6)(C)(ii), for having falsely represented himself to be a United States citizen; and under 8 U.S.C. 1182(a)(7)(A)(i)(I), for not possessing or presenting the proper documentation for admission. Pet. App. 39a-41a. Petitioner conceded removability on the third charge, and an immigration judge (IJ) found that he was removable on the basis of the other two charges as well. *Id.* at 40a-41a, 43a.

Petitioner sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 40a. Through his application and in-court testimony, petitioner stated he feared he would be arrested if he returned to China because of his opposition to family planning regulations. *Id.* at 46a-47a. He stated that he had married Hui Ling Jiang in a traditional ceremony conducted by relatives when he was 21

and she was 17. *Id.* at 50a-51a. Because they both were underage, they could not be legally married, and without a marriage license, they were not permitted to have children. *Id.* at 47a-49a.[1] Petitioner stated that Jiang became pregnant and was forced by local family planning officials to have an abortion. Pet. App. 48a. Petitioner stated that he confronted family planning officials and argued with them, and he claimed that a subpoena was issued for him to appear at the public security bureau. *Id.* at 3a, 48a-49a. Petitioner then left China and entered the United States with the assistance of a smuggler, leaving his purported wife behind. *Id.* at 41a, 50a.

The IJ denied petitioner's application for asylum, withholding of removal, or CAT protection. Pet. App. 39a-58a. Importantly, the IJ made an adverse credibility determination, finding that petitioner's testimony was not at all "convincing" or "believable" and noting that petitioner "change[d] his story as he went along when he was confronted with inconsistencies and the answers he had already given to questions." *Id.* at 55a-57a. Specifically, the IJ found that petitioner gave inconsistent explanations for how his false passport was obtained and whether he knew of its falsity. *Id.* at 55a.

The IJ also found that petitioner's testimony about his purported traditional marriage ceremony was not

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[1] In China, those who marry below the minimum age of marriage may not have their marriage legally registered by the government. See *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 326 n.13 (2d Cir. 2007). Under Chinese law, the minimum age for marriage is 22 for men and 20 for women. See *Chen* v. *Ashcroft*, 381 F.3d 221, 223 n.1 (3d Cir. 2004). The minimum ages are set higher under some local laws. See Bureau of Democracy, Human Rights and Labor U.S. Dep't of State, *China: Profile of Asylum Claims and Country Conditions* (Apr. 14, 1998).

credible, explaining that petitioner "stated that he was single upon his arrival in the United States." Pet. App. 53a. The IJ noted that petitioner failed to produce documentation from village officials attesting to the marriage, any letters or affidavits from his wife's family, or any photographs of the marriage ceremony, and the IJ pointed out an inconsistency regarding the claimed date of the marriage. *Id.* at 52a, 56a. The IJ thus concluded that, as a factual matter, petitioner "failed * * * to prove that he and this person he describes as his wife entered into a traditional marriage." *Id.* at 53a; see *id.* at 56a-57a.

The IJ also rejected petitioner's asylum claim because, even if he had established that he did participate in a traditional marriage ceremony, he would not be entitled to relief under the definition of "refugee" in the INA. Pet. App. 54a-57a. The IJ noted that petitioner was not legally married under Chinese law and only spouses who are legally recognized are deemed eligible for asylum under the "spousal eligibility rule" set forth in *S-L-L-* and *C-Y-Z-*. *Id.* at 54a.

Finally, the IJ rejected petitioner's claim that he had been persecuted, or shown a likelihood of future persecution, on account of his confrontation with population control authorities. Pet. App. 54a. The IJ noted that petitioner "did not present any evidence to show that he suffered any serious injuries" or that he "was arrested or detained or that he suffered any harm at the hands of the Chinese government." *Ibid.* And the IJ determined that petitioner "failed to present consistent and sufficient evidence to establish that anyone in China is look-

ing for him on account of a protected ground." *Id.* at 54a-55a.[2]

3. The BIA affirmed. Pet. App. 35a-38a. It first decided that the IJ correctly determined that petitioner is not eligible for asylum based on his purported wife's forced abortion because an application "must have entered into a legally recognized marriage in order to be considered a spouse" within the meaning of *S-L-L-* and *C-Y-Z-* and petitioner had not entered into a legal marriage. *Id.* at 36a. The BIA then determined that petitioner failed to show that he suffered or will suffer persecution due to "other resistance to a coercive population control program," *id.* at 36a (quoting 8 U.S.C. 1101(a)(42)), finding no "clear error" in the IJ's conclusion that petitioner's testimony about confronting local officials and the subsequent subpoena were not credible, *id.* at 36a-37a.

4. The court of appeals dismissed petitioner's petition for review in part and denied it in part in a per curiam opinion. Pet. App. 1a-17a. The court first held that, even assuming that petitioner's testimony was true, petitioner could not be deemed eligible for asylum as the spouse of a person forced to undergo an abortion. *Id.* at 10a-13a. The court deferred to the BIA's decision in *S-L-L-* that only legally married applicants are eligible for asylum, concluding that the BIA's interpretation of the statute was reasonable and thus was due *Chevron* deference. *Id.* at 10a-13a. The court explained that

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[2] The IJ also rejected petitioner's claims for withholding of removal and protection under the CAT. Pet. App. 57a-58a. The BIA likewise rejected those claims. *Id.* at 38a. The court of appeals rejected petitioner's withholding claim and found that petitioner abandoned his CAT claim. *Id.* at 7a n.1 & 17a. Petitioner does not renew either of those claims before this Court.

"legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not," and that a "legal husband * * * shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives." *Id.* at 12a. Indeed, the court stated, "'it would be absurd to characterize reliance on marital status * * * as arbitrary and capricious'" when "benefits and presumptions based on marriage are found in so many other areas of the law." *Ibid.* (citation omitted). Because petitioner conceded that he is not legally married, the court concluded, he "cannot claim refugee status under the provision in § 1101(a)(42) that 'a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion.'" *Id.* at 13a.

The court also held that petitioner failed to establish refugee status based on his own "resistance to a coercive population control program." Pet. App. 13a-17a (quoting 8 U.S.C. 1101(a)(42)). Even assuming that all of petitioner's testimony was true, the court explained, he had not established past persecution or a likelihood of future persecution, because petitioner "was not detained for any length of time," "suffered no physical injuries from his encounter with family planning officials," and faced "little risk of physical violence for having opposed the family planning laws if returned to China." *Id.* at 16a. The court thus affirmed the BIA's holding that petitioner had not established eligibility for asylum. *Id.* at 17a.

## ARGUMENT

The court of appeals correctly determined that an applicant who participates in a traditional marriage cer-

emony, but is not legally married, is not automatically deemed eligible for asylum if his partner is forced to undergo an abortion. Although there is disagreement on that issue in the courts of appeals, the issue is not ripe for review at this time, for two reasons. First, the decisions that have extended asylum eligibility to persons who are not legally married but participated in traditional marriage ceremonies have been called into doubt by the BIA's recent decision in *S-L-L-*. Second, the Attorney General has recently certified a related decision to himself to revisit the BIA's "spousal eligibility rule." It would be premature for this Court to review the question presented now, before giving the courts of appeals an opportunity to consider the BIA's decision in *S-L-L-* and the decision to be rendered by the Attorney General on certification.

In any event, this case is not a suitable vehicle for resolving the question presented, because petitioner could not take advantage of the "spousal eligibility rule" even if it were extended to persons who were not legally married but had participated in a traditional marriage ceremony. The IJ found that petitioner was not credible and had not actually participated in a traditional marriage ceremony. Because this Court's resolution of the question presented would have no effect on the ultimate disposition of this case, further review is unwarranted.

1. The court of appeals correctly determined that an applicant who contends that he was married in a traditional ceremony to a person later forced to undergo an abortion is not automatically eligible for asylum under the INA. The relevant statutory provision provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political

opinion." 8 U.S.C. 1101(a)(42). Contrary to petitioner's contention (Pet. 19-20), the plain text of the statute does not compel the conclusion that a person who participated in a traditional ceremony with a person forced to abort a pregnancy is deemed to have been persecuted. The court of appeals recognized as much, noting that even the BIA's determination that *legally* married spouses may qualify under that provision was based "not on anything Congress explicitly said in § 1101(a)(42)" but on the BIA's interpretation of the statute. Pet. App. 11a.

The agency has made clear its view that the statute does not extend to participants in traditional marriage ceremonies, and the court of appeals correctly held that that view is entitled to deference.[3] In *S-L-L-*, the BIA recently reaffirmed the "spousal eligibility rule' it adopted in *C-Y-Z-*, stating that, "[a]lthough there is no specific reference in the statutory definition of a refugee to a husband's claim based on harm inflicted upon his wife, the general principles regarding nexus and level of harm apply in determining such a claim." 24 I. & N. Dec. at 5. It noted that Chinese law "imposes joint responsibility on married couples for decisions related to family planning," and "[a] married couple may be subjected to social ostracism and pressures from Government officials," "threatened with fines," have "their property * * * damaged or confiscated," and one or both spouses may be "threatened with demotion, job

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[3] This case does not raise the question whether the BIA's spousal eligibility rule is entitled to deference, because the court of appeals assumed the validity of that rule. See Pet. App. 11a-12a. Thus, the only question before the Court is whether the BIA's refusal in *S-L-L-* to extend the rule to an applicant who participated in a traditional marriage ceremony is reasonable.

loss, or other economic sanctions for refusing to agree to an abortion." *Id.* at 6-7.

The BIA limited its holding to *legal* marriages. It stated in *S-L-L-* that its decision in *C-Y-Z-* "relies on marriage as the linchpin," because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." 24 I. & N. Dec. at 8-9. The BIA explained: "In the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement." *Id.* at 9-10. For example, if the unmarried partner of a woman forced to undergo an abortion were deemed eligible for asylum, "[p]roof or presumption of paternity * * * may be considerably more difficult." *Id.* at 10.

Petitioner is mistaken in suggesting (Pet. 21-22, 27 n.5) that the BIA did not consider the case of a participant in a traditional marriage ceremony in *S-L-L-*. The BIA made clear that "the holding in *Matter of C-Y-Z-* is limited to *legally married* spouses." 24 I. & N. Dec. at 10 (emphasis added). The BIA specifically noted, and rejected, the argument that a person who was "denied permission to marry and bear a child based on the minimum age requirements of the Chinese family planning law" should be deemed eligible for asylum, stating that the BIA "require[s] that an applicant have entered into a *legally recognized marriage* in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*." *Id.* at 12 (emphasis added); see *id.* at 12 n.14 (distinguishing the situation of "an underage couple [that] has entered into a traditional marriage ceremony"). The BIA has

thus already rejected petitioner's claim (Pet. 24) that "'traditional marriage' and 'legally sanctioned marriage' are indistinguishable."

Because the agency charged with interpreting the statute has clearly stated its view that a person who participated in a traditional marriage ceremony should not automatically be deemed eligible for asylum under the statutory provision at issue, the only question is whether that determination is reasonable and thus entitled to deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (BIA's reasonable construction of the INA is entitled to *Chevron* deference). That determination is reasonable and entitled to deference, for two reasons.

First, as the court of appeals noted, the BIA's reliance on marital status is appropriate because "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the [INA]." Pet. App. 12a (citing *S-L-L-*, 24 I. & N. Dec. at 9; *Chen* v. *Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004)). The BIA's longstanding rule is that "the validity of a marriage" for immigration purposes "is determined according to the law of the place of celebration." *In re Gamero*, 14 I. & N. Dec. 674, 674 (B.I.A. 1974). In this context, the legal marriage requirement "contributes to efficient administration and avoids difficult and problematic factual inquiries," because legal marriages in China "can often be proven easily and reliably through objective documentary evidence such as marriage certificates or household registration booklets." *Chen*, 381 F.3d at 228 (internal quotation marks omitted). The BIA therefore reasonably decided that a person who has not legally married may not be deemed to have been

persecuted based on his partner's forced abortion. *Id.* at 227.

Second, a legally married couple occupies a fundamentally different position in society than a couple that is not married. As the court of appeals explained, "[a] legal husband, at least in the eyes of the government, shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives." Pet. App. 12a. In contrast, "[a]n underage couple living in an unregistered de facto marital relationship [that] is not recognized as a married couple by the Government * * * do[es] not have the legal rights and obligations of a married couple." *S-L-L-*, 24 I. & N. Dec. at 12 n.13. For that reason, the BIA may reasonably use marital status as "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person." Pet. App. 12a-13a (quoting *Chen*, 381 F.3d at 227).

The court of appeals thus correctly deferred to the BIA's determination that a legally unmarried partner of a person forced to undergo an abortion is not automatically deemed to have been persecuted on the basis of political opinion under 8 U.S.C. 1101(a)(42). Petitioner concedes that he is not legally married, Pet. 9, and therefore he is not eligible for relief under the "spousal eligibility rule" in *C-Y-Z-* and *S-L-L-*. See Pet. App. 36a. Even if petitioner had been married in a traditional ceremony (a fact the IJ refused to find because she determined that petitioner's testimony was not credible, Pet. App. 53a), petitioner would not be eligible for asylum under the text of the statute or the BIA's interpretation

of it in *S-L-L-*.[4] The court of appeals therefore correctly rejected his claim.

2. Petitioner contends that review is warranted because the Seventh and Ninth Circuits have held that participants in traditional marriage ceremonies may be deemed refugees under the BIA's spousal eligibility rule, while the court below and the Second Circuit have held that such persons may not be deemed refugees. Pet. 12-17 (citing *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma* v. *Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); and *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007)). Although there is some disagreement in the circuits on this issue, review is not appropriate at this time.

As the court of appeals explained, the decisions in *Zhang* and *Ma* are of "little persuasive value" because they pre-dated the BIA's decision in *S-L-L-*, which was the first published BIA decision explicitly to limit the application of the spousal eligibility rule to an applicant who is legally married. Pet. App. 13a; see also *S-L-L-*, 24 I. & N. Dec. at 12. The court explained that, because the text of the statute does not unambiguously provide that a person who marries a person forced to abort a pregnancy is deemed to have been persecuted, the court

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[4] Although an unmarried partner of a person forced to undergo an abortion or sterilization is not eligible for asylum on the basis of his relationship with the person persecuted, he or she may be eligible for asylum based on his or her *own* "resistence to a coercive population control program." 8 U.S.C. 1101(a)(42); see *S-L-L-*, 24 I. & N. at 10-11. Although petitioner made such a claim below, the IJ, BIA, and court of appeals rejected it, Pet. App. 13a-17a, 36a-37a, 54a-55a, and petitioner does not renew it before this Court. The claim therefore has been abandoned.

must consider whether the BIA's interpretation of the statute in *S-L-L-* was reasonable under *Chevron*. Pet. App. 12a- 13a. Because the BIA's legal marriage requirement is reasonably based on the different rights and responsibilities of legally married couples as opposed to unmarried couples, the court of appeals correctly deferred to it. See *ibid.*

The Seventh and Ninth Circuits may well reconsider their decisions in *Zhang* and *Ma* in light of the recent decision in *S-L-L-*. Neither court analyzed the text of the INA and determined that the plain language compelled extension of asylum eligibility to persons married in traditionally ceremonies. Rather, both the *Zhang* and *Ma* courts cited *C-Y-Z-*, which did not distinguish between legal and traditional marriages, and determined that interpretation of the statute to include traditional marriages would further a legislative policy of providing protection to partners of persons who underwent forced abortions and sterilizations. See *Zhang*, 434 F.3d at 999, 1001; *Ma*, 361 F.3d at 559. In *S-L-L-*, however, the BIA made clear that its spousal eligibility rule does not extend to participants in traditional marriage ceremonies and provided a detailed explanation for why Congressional policy does *not* favor extension of the statute to unmarried partners. See 24 I. & N. Dec. at 5-7, 10-12. Because the decisions in *Zhang* and *Ma* did not turn on a determination that was compelled by the plain terms of the statute, the Seventh and Ninth Circuits may well reverse course in light of *S-L-L-*. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (agency is entitled to deference unless "the prior court decision h[eld] that its construction follows from the unambiguous terms of the statute and

thus leaves no room for agency discretion").[5] Review by this Court at this time thus would be premature.

Moreover, review of the question presented also would be premature because the Attorney General is now considering whether the agency's position should be modified. In *Lin* v. *United States Department of Justice*, 494 F.3d 296 (2007), the Second Circuit rejected the BIA's spousal eligibility rule, holding that the statutory provision conferring refugee status on asylum applicants who have been subjected to involuntary sterilizations or abortions does not provide the spouses of such persons with a per se entitlement to refugee status.[6] The Third Circuit then issued a *sua sponte* briefing order in another case, *Shi* v. *Attorney General*, No. 06-1952 (3d Cir. July 27, 2007), slip op. 1, suggesting that it wished to revisit the spousal eligibility rule. In response, the Attorney General directed the BIA to refer the agency's decision in *Shi* to him so that he could review the spousal eligibility rule. See 8 C.F.R. 1003.1(h)(1)(i).

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[5] Contrary to petitioner's suggestion (Pet. 15), neither the Seventh Circuit nor the Ninth Circuit has considered the impact of the BIA's decision in *S-L-L-* on their own prior decisions. Petitioner cites (Pet. 15) two cases decided in those circuits after *S-L-L-*, but the briefing in both cases was completed before the decision in *S-L-L-*, no party brought *S-L-L-* to either court's attention, and neither of the decisions even mentioned *S-L-L-*. See *Tang* v. *Gonzales*, 489 F.3d 987, 990-991 (9th Cir. 2007) (citing *C-Y-Z-* but not *S-L-L-*); *Lu* v. *Gonzales*, 199 Fed. Appx. 552, 554 (7th Cir. 2006) (unpublished) (same). Moreover, the asylum applicant in *Lu* did not participate in a traditional marriage ceremony, so the question whether the statute includes those who participate in traditional marriage ceremonies was not even presented in that case. See 199 Fed. Appx. at 554.

[6] *S-L-L-* was the BIA decision that the Second Circuit reviewed in *Lin*.

The Attorney General instructed the parties to submit briefs addressing

> all relevant statutory questions including, but not limited to, whether IIRIRA § 601(a), codified at 8 U.S.C. § 1101(a)(42), is ambiguous or silent on the availability of refugee status for spouses or partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (2006) (en banc) is correct.

Att'y Gen. Order No. 2905-2007, at 1 (Sept. 4, 2007).

The Attorney General therefore has undertaken to reexamine the Department's position with respect to whether a person who has not personally suffered a forced abortion or sterilization may automatically obtain asylum on the basis of his or her partner's persecution. The facts of *Shi* are different from this case, in that the applicant in *Shi* was legally married to the person arguably subject to coercive population control measures. See *In re Shi*, No. 95 476 611 (Immigr. Ct. Nov. 8, 2004), slip op. 4-6. Nonetheless, the Attorney General's resolution of *Shi* may impact this case. The plain text of the statute does not mention spouses, and the spousal eligibility rule has been long understood to be a permissible, but not required, interpretation of the statute. See Pet. App. 11a-12a. If the Attorney General modifies the agency's position, then courts will be required to consider whether the new position is entitled to deference.[7]

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[7] Contrary to petitioner's assertion (Pet. 19-20), neither the Seventh Circuit nor the Ninth Circuit has held that the plain language of the statute compels the conclusion that a person who participates in a

This Court thus should decline to consider the question presented at this time.

3. Even if the question presented otherwise warranted review at this point in time, this case would not be a suitable vehicle for doing so, because petitioner has failed to establish that he participated in a traditional marriage ceremony. The IJ made extensive credibility findings, noting that petitioner was not at all "convincing" or "believable" and that he "change[d] his story as he went along, when he was confronted with inconsistencies and the answers he had already given to questions." Pet. App. 55a-56a. The IJ thus found that, as a factual matter, petitioner "failed * * * to prove that he and this person he describes as his wife entered into a traditional marriage." *Id.* at 53a.

The BIA did not disturb or address the IJ's factual finding that petitioner did not participate in a traditional marriage ceremony, because it held that petitioner could not in any event establish asylum eligibility on the basis of the involuntary abortion "of a woman that he claims he married in a traditional marriage ceremony." Pet. App. 36a. That factual finding, however, may only be overturned by the BIA if it is "clearly erroneous," 8 C.F.R. 1003.1(d)(3)(i), that is, if the BIA has "the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Moreover, that factual finding must be upheld by the court of appeals as long as it is

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traditional marriage ceremony is automatically deemed to have been persecuted if the other participant is thereafter subjected to a coercive population control practice. See pp. 15-16, *supra*. The courts therefore will be required to assess whether whatever interpretation the Attorney General renders is entitled to deference. See *Brand X*, 545 U.S. at 982-983; *Aguirre-Aguirre*, 526 U.S. at 424-425.

supported by substantial evidence, *Elias- Zacarias*, 502 U.S. at 481, meaning that the IJ's finding is "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner cannot establish clear error or a lack of substantial evidence in light of the numerous inconsistencies in his testimony, including the fact that he originally told immigration officials that he was "single," then later claimed that he participated in a traditional marriage ceremony. See Pet. App. 53a. Under these circumstances, further review of the question presented is unwarranted because it would not affect the outcome in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# In the Supreme Court of the United States

YI QIANG YANG,

*Petitioner*,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## ARGUMENT

The government concedes that the circuits are divided on a recurring question of undoubted importance: whether traditionally married spouses of women subjected to forced abortions in other nations are eligible for asylum under Section 601 of IIRIRA. Opp. 9. It nevertheless contends that review of this question would be premature because the courts that recognize a right to asylum for such refugees might reverse course in light of a recent BIA decision. But that simply is not so. Those courts *already* have expressly rejected "[t]he BIA's refusal to grant asylum" to such individuals because it "contravenes the statute and leads to absurd and wholly unacceptable results." *Ma* v. *Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004). There is no prospect that these courts will change a view that is grounded firmly on "the purpose and policies of the statut[e]." *Id.* at 560.

The government also is wrong in urging denial of the petition on the ground that the Attorney General is currently considering, in *Matter of Shi*, No. 95 476 611, whether spouses of persons subjected to coerced abortion or sterilization are entitled to asylum. It is not clear that the proceeding in *Shi* – which, the government concedes (Opp. 17), does *not* involve a traditionally married spouse – will have any direct bearing on the question presented here. And the conflict in the circuits on that question will, in any event, survive the resolution of *Shi* no matter how that proceeding is decided. But if it is thought that resolution of the question presented here should await the outcome of *Shi*, this petition should not be denied: it should be held by this Court, or returned to the court of appeals, so that ultimate disposition of petitioner's request for asylum may take account of any guidance

provided by *Shi*. Notably, the government's brief in opposition to the petition does not object to such a disposition.

### A. The Circuits Will Remain Split On The Question Presented Here, Notwithstanding The BIA Decision In *S-L-L-*.

There is no denying the existing conflict in the courts of appeals. In the Seventh and the Ninth Circuits, traditionally married spouses are eligible for asylum relief under Section 601. *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma* v. *Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004). In contrast, the court below denies such protection. Pet. App. 12a. So, too, does the Second Circuit, albeit on different grounds. *Shi Liang Lin* v. *U.S. Dep't Justice*, 494 F.3d 296, 300 (2d Cir. 2007), cert. filed *sub. nom Zen Hua Dong* v. *Mukasey*, No. 07-639 (Nov. 13, 2007). The government therefore cannot avoid acknowledging what it delicately characterizes as "some disagreement in the circuits on this issue." Opp. 14.

Despite conceding the circuit conflict, the government speculates that "the Seventh and Ninth Circuits may well reconsider their decisions" in light of the BIA's decision in *Matter of S-L-L-*, 24 I. & N. Dec. 1 (2006). Opp. 15. But this submission is wrong on two counts. First, contrary to the government's assertion (*id.* at 11-12), the BIA in *S-L-L-* was not presented with, and did not decide, the question whether traditionally married spouses are entitled to asylum. Instead, the petitioner there was the unmarried boyfriend of a woman who became pregnant. *Matter of S-L-L-*, 24 I. & N. Dec. at 11. Finding that marriage is the "linchpin" in determining whether an asylum applicant has been persecuted within the meaning of Section 601 (*id.* at 8-11), the BIA deter-

mined that boyfriends and fiancés are not per se eligible for asylum under that provision because relief should be awarded only "to couples who have actually committed to a marital relationship." *Id.* at 12.[1] That determination, however, begs the question presented by this petition: whether *traditionally married* spouses are eligible for relief under Section 601. Unlike the asylum applicant in *S-L-L-*, petitioner here has "actually committed to a marital relationship"; the government does not deny that traditional marriages in China are, except for the absence of a government registration form, identical in all relevant respects to legally registered marriages. See Pet. 24-26.[2]

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[1] To be sure, the BIA opinion in *S-L-L-* refers interchangeably to "marriage," "legal marriage," and "legally married." Given that the distinction between traditional and legal marriage was not at issue in *S-L-L-* and not expressly considered by the BIA, however, the opinion's inconsistent use of this terminology is not determinative. Indeed, immediately after stating that commitment to a "marital relationship" is key and that "we require that an applicant have entered into a legally recognized marriage" to satisfy this test (24 I. & N. Dec. at 12), the BIA acknowledged – without express disapproval – that "two circuit courts have decided to the contrary when an underage couple has entered into a traditional marriage ceremony." *Id.* at 12 n.14 (citing *Zhang* and *Ma*).

[2] Further, the government's position that *S-L-L-* precludes relief for traditionally married spouses is undercut by prior BIA decisions. *C-Y-Z-* itself – the decision that recognized application of Section 601 to spouses – provided relief to a traditionally married spouse. Pet. 27 n.5. See *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 915-16 & n.1 (BIA 1997). The BIA again provided relief to a traditionally married spouse in *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003) (en banc). There, Board Member Pauley dissented, arguing that the majority's opinion extended Section 601 to provide asylum for those "whose marriages are evidenced only by a traditional ceremony in China (without a requirement

Second, and more fundamentally, whatever the meaning of the BIA's decision in *S-L-L-*, both the Seventh and Ninth Circuits premised their decisions awarding relief to traditional spouses on the unambiguous dictates of the statute, expressly rejecting the BIA's contrary view. Therefore, even if the BIA issues a specific and formal ruling with respect to the asylum eligibility of traditionally married spouses, these courts will not change course.

In *Ma*, 361 F.3d 553, the BIA held that the traditionally married spouse was ineligible for per se asylum protection under Section 601. *Id.* at 558. The Ninth Circuit acknowledged that it "owed" deference to "the BIA's reasonable interpretations" of the statute. *Ibid.* (quoting *Kalmalthas* v. *INS*, 251 F.3d 1279, 1282 (9th Cir. 2001)). But the court nonetheless held that the BIA's construction "contravenes the statute and leads to absurd and wholly unacceptable results." *Id.* at 559. As a consequence, the court expressly did "not defer to the BIA's decision." *Ibid.* See also *id.* at 560 (BIA approach "contravenes the purpose and policies of the statutory amendment."); *id.* at 561 ("it would contravene the statute to permit asylum decisions to be made in reliance on the legitimacy of [China's coercive] program.").

Similarly, in *Zhang*, the IJ denied asylum because China's "population control policy rendered the marriage illegal." *Zhang*, 434 F.3d at 999. The Seventh Circuit reversed, holding that this interpretation "would entirely subvert the Congressional amendment." *Ibid.* Like the Ninth Circuit, the Se-

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that such marriages be legally recognized by that country)." *Id.* at 619 (Pauley, Board Member, dissenting). But his dissent failed to carry the day, and the majority provided asylum for a traditionally married spouse.

venth Circuit therefore has already refused to defer to a contrary agency construction of Section 601. This conflict in the courts of appeals accordingly is settled and ripe for review.

### B. The Proceeding Before The Attorney General Should Not Preclude Relief For Petitioner.

The government further argues that the matter pending before the Attorney General, *Matter of Jianzhong Shi*, provides an additional reason to deny certiorari. But as we explain in the petition (at 28-29), the conflict in the circuits will survive the outcome in *Shi*. The government does not deny that the Second Circuit's holding that *no* spouses are entitled to per se asylum relief under Section 601 rests on the statutory language and rejects a contrary administrative view. And as we show above, the opposite rule in the Seventh and Ninth Circuits likewise rests on an interpretation of the statute. Nothing the Attorney General decides in *Shi* can moot that disagreement.[3]

Moreover, if the Court nevertheless is of the view that resolution of the issue here should be deferred pending resolution of *Shi*, the proper outcome would be to hold or remand this case for reconsideration in light of the Attorney General's ruling in that proceeding. As we show in the petition (at 29-30), it would be grossly inequitable to petitioner to deny certiorari now – preventing him from benefiting either from a favorable ruling in *Shi* or from the possi-

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[3] An opinion of the Attorney General pursuant to 8 C.F.R. § 1003.1(h) is due no greater deference than an opinion of the BIA. See, *e.g.*, *Rumierz* v. *Gonzales*, 456 F.3d 31, 40-41 (1st Cir. 2006).

bility of this Court's review – simply because the Attorney General has not yet concluded a proceeding that might support petitioner's request for relief. The government's opposition makes no response to this point.

In closely analogous circumstances, this Court frequently grants certiorari, vacates the decision below, and remands for consideration in light of agency action that bears on the case. See, *e.g.*, *Schmidt* v. *Epsy*, 513 U.S. 801 (1994) (GVR in light of a new agency interpretation of federal statute that called into question the lower court's decision); *Lawrence* v. *Chater*, 516 U.S. 163, 165-66 (1996) (per curiam) (GVR after Social Security Administration reexamined its position on the question presented by the petition and issued a new interpretation beneficial to the petitioner). See also *Lawrence*, 516 U.S. at 166-67 (cataloguing appropriate uses of a GVR). Here, if the proceeding in *Shi* is thought relevant, it accordingly would be appropriate to await the forthcoming agency action before finally disposing of this case, either by holding the case in this Court or remanding the case to the Eleventh Circuit with instructions to reconsider its decision in light of the Attorney General's forthcoming decision in *Shi*.

### C. There Is No Alternative Holding Below That Precludes Review.

The government's further contention that a ruling for petitioner on the meaning of Section 601 "would not affect the outcome in this case" because the IJ made credibility findings adverse to petitioner (Opp. 19) is flatly wrong. The court below made clear that its decision rested *solely* on its construction of Section 601; it "assum[ed] for present purposes that everything [petitioner] said is true." Pet.

App. 10a. The BIA likewise did not address petitioner's credibility. *Id.* at 36a. Upon remand, petitioner has substantial arguments – noted and reserved by the court below – responsive to the IJ's credibility findings.

First, as the court of appeals noted, the IJ's credibility determinations were largely based upon petitioner's statements at an airport interview. Pet. App. 9a. But the court added that "three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability." *Ibid.* (citing *Balogun* v. *Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004); *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004); *Balasubramanrim* v. *INS*, 143 F.3d 157, 164 (3d Cir. 1998)). The Third Circuit, for example, reversed an adverse credibility finding that had been based on an airport interview because the interview was improperly recorded, it did not take place in a forum meant to elicit accurate information regarding asylum claims, and the applicant lacked sufficient English language skills to assure the interview's reliability. *Balasubramanrim*, 143 F.3d at 163-64. Given its statutory holding, the Eleventh Circuit here "had no occasion to address the reliability of airport interviews" generally or the particular reliability of the interview in this case. Pet. App. 10a.

Second, the court below indicated that "[t]here was other evidence in the record supporting [petitioner's] account of the events" (*id.* at 10a), which it recounted in considerable detail: a note from a Chinese hospital "stating that Ling had an induced abortion"; a subpoena from the local security office "summoning Yang to its office the next day"; a receipt for two wedding rings "paid for by Yang"; a let-

ter from Yang's uncle describing the wedding of Yang and Ling; and an affidavit and letter from Ling describing their traditional wedding, the coerced abortion, and its aftermath. *Id.* at 3a-4a. If petitioner prevails regarding the proper interpretation of Section 601, he accordingly will have substantial arguments to make regarding his credibility. And certainly, unreviewed and dubious credibility determinations that expressly were disregarded by the court below do not provide a reasonable basis for denying review of issues that otherwise warrant this Court's consideration.[4]

### D. Traditionally Married Spouses Are Eligible For Asylum Under Section 601.

Finally, the government's defense of the decision below on the merits (Opp. 12-14) offers no reason for the Court to decline to resolve the conflict in the courts of appeals regarding the proper interpretation of Section 601. Nor does this merits argument present a reason why the petition should not be held pending the Attorney General's resolution of *Shi*.

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[4] IJ credibility findings are frequently reversed by the courts of appeals. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 tbl.2 (2007). Indeed, Judge Posner recently concluded that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice," noting that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review * * * on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005). An adverse credibility determination by an IJ – especially one that has been questioned by the circuit court – does not provide a reasonable, independent ground to deny certiorari.

In any event, the government's argument is fundamentally flawed on its own terms. As we show in the petition (at 24-26) – and as the government does not deny – traditional and legally registered marriages in China are virtually indistinguishable in all relevant respects. Spouses in traditional and legal marriages perform exactly the same cultural wedding ceremony. John W. Engel, *Marriage in the People's Republic of China*, 46 J. of Family & Marriage 955, 958-59 (1984). The long-term commitment reflected by these relationships is identical. See Pet. 24-26. And the credibility determination necessary to establish the existence of a traditional marriage is not different in kind from the findings that IJs are routinely required to make in the course of administering the Nation's immigration and asylum laws.

The government nevertheless argues that legal marriage is the appropriate standard because legally married spouses jointly face the repercussions for disregarding China's population control policy. Opp. 13. In fact, however, traditionally and legally married spouses are persecuted in precisely the same way by the state for violations of that policy. The termination of the couple's pregnancy, or the forced sterilization of one individual, affects both spouses, regardless of the legal status of their marriage. See Pet. App. 2a-3a. Moreover, state-imposed punishments for violations of the family planning policy are imposed against *both* members of a traditionally married couple. See *Zhang*, 434 F.3d at 995 (authorities forcibly aborted the unborn child of Zhang and his wife, who were traditionally married; authorities then ordered Zhang to pay a fine); *Ma*, 361 F.3d at

556-57 (same).[5] When imposing punishments for violations of the family planning policy, Chinese officials do not distinguish between legally and traditionally married couples. U.S. asylum law should be no different.

In addition, as the Seventh and Ninth Circuits recognized, denying protection to traditionally married spouses directly frustrates the central purpose of Section 601. See Pet. 26-27. Congress enacted the legislation to provide relief for families that have been victimized by China's coercive family planning policy. But that same policy both prevented petitioner and his wife from obtaining legal recognition for their marriage and, because they were not legally married, forced them to abort their child. This "Catch-22," the Seventh Circuit explained, dictates the conclusion that, "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum." *Zhang*, 434 F.3d at 999. See also *Ma*, 361 F.3d at 561 ("[B]ecause the prohibition on underage marriage is an integral part of [China's family planning policy], it would contravene the fundamental purpose of the statute to deny asylum on the basis of that rule.").

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[5] In arguing to the contrary, the government, quoting *S-L-L-*, carefully refers to "'[a]n underage couple living in an unregistered de facto marital relationship.'" Opp. 13 (quoting 24 I. & N. Dec. 12 n.13). But the couple in *S-L-L-*, unlike petitioner and his wife, were not married at all.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold the case pending the outcome of the Attorney General's proceeding in *Matter of Jianzhong Shi*.

Respectfully submitted.

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